

(21,262.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 200.

DURYEA POWER COMPANY, BANKRUPT, BY ITS TRUSTEE, THE BERKS COUNTY TRUST COMPANY, APPELLANT,

vs.

HERBERT M. STERNBERGH.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT.

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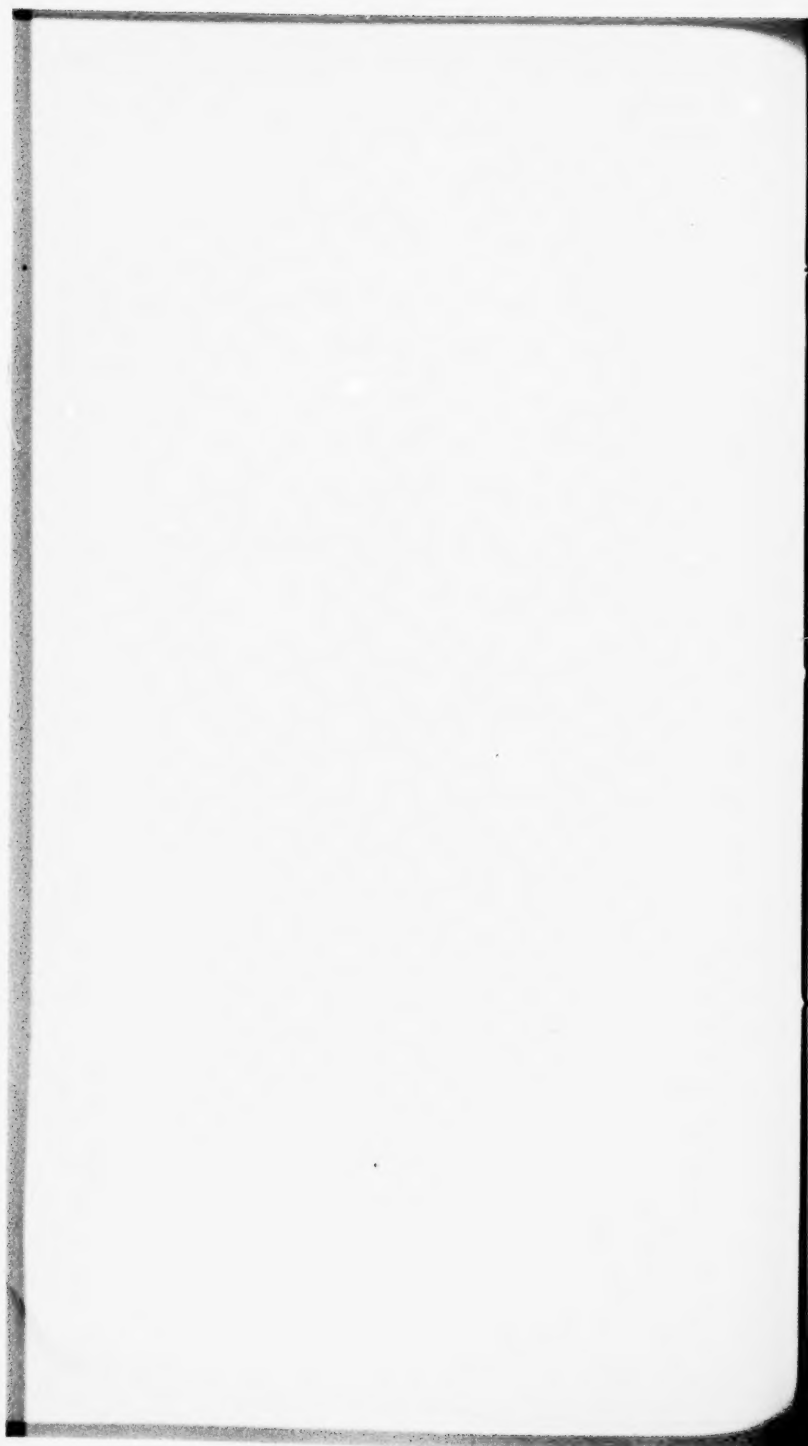
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No. 2768.

## DURYEA POWER COMPANY.

1907.

May 2.—Order of reference received and filed, and bankrupt ordered to appear before the Referee and file schedules.

May 16.—Notice sent by Referee to bankrupt, to file schedules.

May 21.—Petition of creditors for order on H. M. Sternbergh, Pres't of bankrupt company, and the Pennsylvania Trust Company Receiver, to turn over books, &c., to Referee on May 22, at 10 A. M., for the purpose of preparing schedules, filed. Same day, order granted.

May 21.—Affidavit of service of copies of the above order filed.

May 22.—H. M. Sternbergh, E. H. Deysher, Att'y for Receiver, and Geo. W. Wagner, Att'y for petitioning creditors, appear. Adjourned to 1.30 P. M.

May 22, 1.30 P. M.—Schedules filed for Bankrupt by Pennsylvania Trust Company, Receiver of Duryea Power Company, under appointment by Court of Common Pleas of Berks County, per H. B. Hagy, Trust Officer. June 6, at 11 A. M., fixed by Referee for first meeting of creditors.

May 24.—Notice of first meeting of creditors given by publication in the Reading Daily Eagle.

May 25.—Notice of first meeting of creditors given by mail to creditors and parties interested.

May 25.—Referee's certificate of publishing and mailing said notices, filed.

June 6, 11 A. M.—First meeting of creditors. Present: The bankrupt's officers, the Receiver, attorneys and creditors. Claims presented and filed as per notes, etc. Adjourned to 2 P. M. Hearings and testimony taken on claims, especially claim of H. M. Sternbergh, for \$14,438.86. Hearing on claims suspended pending nominations for trustees. The Berks County Trust Company and the Pennsylvania Trust Company nominated for Trustee. Votes of sundry creditors desiring to leave, taken; election unfinished. Adjourned to June 20, 1907, at 11 A. M.

June 20.—Notes of proceedings of June 6th, and testimony then taken, filed.

June 20, 11 A. M.—Adjourned first meeting. Claims proven and allowed. Adjourned to 2 P. M.

June 20, 2 P. M.—Adjourned first meeting of creditors. Exceptions to claim of H. M. Sternbergh and additional testimony thereon heard, said written exceptions having been filed at the opening of the meeting. Argument for and against Sternbergh claim heard. Decision reserved.

2 June 21, 11 A. M.—Adjourned first meeting. Referee refuses to allow claim of H. M. Sternbergh for voting purposes, at this time, without prejudice to the privilege to offer same later. (See notes) Claims proven and allowed. Claim of C. E. Duryea,

orally objected to by E. H. Deysher, counsel for creditors, taken up and examined. Adjourned to 2 P. M.

June 21, 2 P. M.—Adjourned first meeting. Examination of Duryea claim continued. Adjourned to Sat. June 22, 10.30 A. M.

June 22, 10.30 A. M.—Adjourned first meeting. Examination — Duryea claim continued. Adjourned to Sat. June 22, 10.30 A. M.

June 24, 10 A. M.—Adjourned first meeting. Examination of Duryea claim continued. C. E. Duryea examined on method of procuring proxies. Adjourned to 2 P. M.

June 24, 2 P. M.—Objections of certain creditors to appointment of Penna. Trust Co. as trustee, filed. Adjourned first meeting. C. E. Duryea and others examined on method of procuring proxies in favor of Duryea and Geo. W. Wagner. E. H. Deysher for creditors whom he represents, moves the disallowance of C. E. Duryea's claim, and the disallowance of proxies to Duryea and Wagner. Motions refused by Referee (see notes). Balloting for trustee resumed. Referee finds 76 votes for certain creditors aggregating about \$12,000 to have been cast for the Pennsylvania Trust Company, and 77 votes for creditors aggregating about \$45,000 to have been cast for the Berks County Trust Company of Reading. Balloting closed. Referee declares Berks County Trust Company elected Trustee. Meeting adjourned to July 9, at 10 A. M.

June 24.—Appointment of Trustee by creditors, and order approving appointment, filed.

June 27.—Notice of appointment as Trustee sent by mail to the Berks County Trust Company, by the Referee.

June 29.—Geo. Thos. Garside, Louis Lauther, and Oscar Wanner appointed appraisers by the Referee.

July 1.—Oath of appraisers filed.

July 1.—Petition of H. M. Sternbergh for petition of review and stay of proceedings, and order thereon, filed.

July 2.—Notes of proceedings of adjourned first meeting held June 20, 21, 22 and 24, and notes of testimony taken, filed.

I, Samuel E. Bertolet, the Referee in Bankruptcy in charge of the foregoing cause, hereby certify the foregoing to be the book of the record of the proceedings therein.

Dated July 3, 1907.

SAMUEL E. BERTOLET,  
*Referee in Bankruptcy.*

3 In the District Court of the United States for the Eastern District of Pennsylvania.

No. 2768. In Bankruptcy.

In the Matter of THE DURYEA POWER COMPANY, Bankrupt.

*Referee's Certificate on Review.*

To the Honorable the Judges of said Court:

I, Samuel E. Bertolet, the referee in bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceedings, certain orders, copies of which are annexed to the petition hereinafter referred to, were made and entered on June 21 and 24 respectively, 1907.

That on July 1, 1907, Herbert M. Sternbergh, a creditor in such proceeding, feeling aggrieved thereat, filed a petition for a review which was granted.

That a summary of the evidence, &c., on which the order complained of were based, is as follows:

On June 6, 1907, when the first meeting of the creditors was held, Herbert M. Sternbergh, offered for allowance, a proof of claim (copy here attached) amounting to \$14,438.86. This was objected to by counsel for other creditors, on the ground, inter alia, that claimant was indebted to the bankrupt company for unpaid stock. Claimant announced that he intended to use this claim for voting purposes in the selection of a trustee. Referee immediately ordered the claim to be examined. It appeared that claimant was the holder of 510 shares of capital stock of the bankrupt company. On page 18 of Notes of Testimony, &c., filed June 20, 1907, claimant testified that he had subscribed for these shares, par value \$100 per share, and had paid on the subscription \$25,000, and that he still owed \$26,000. It was shown by a transcript of a report made to the State Department at Harrisburg, that the company through its President, H. M. Sternbergh, the claimant here, had certified to the Secretary of the Commonwealth that \$100,000 worth of stock had been issued for cash and property. (Copy of transcript Ex. "A," hereto attached.)

At an adjourned first meeting of creditors, held June 20, 1907, the claimant's counsel offered additional testimony in support of his claim. The claimant was called and said that he had misunderstood the meaning of the question when asked how much stock he had subscribed for, thinking that it meant how much he held; that he actually did not subscribe for 510 shares of stock but got them

4 through an issue made to him by the Directors of the Company after the company had (as per transcript called Ex. "A") increased its capital stock from \$1,000 to \$100,000. I may say that, according to the Minute Book, marked Ex. "D" which contains a copy of the application for charter and letters patent issued thereon, pages 1 to 5 of Minute book, the Duryea Power Company, bankrupt, was chartered April 6, 1900; and that in same Minute book,

pages 9 to 11, it appears that on April 20, 1900, the stockholders authorized the increase of stock, the Directors of the Company voted to Herbert book, *Ex. "D," page 12, on April 20, 1900, immediately after the increase of stock, the Directors of the Company voted to Herbert M. Sternbergh, 510 shares of capital stock, in consideration of \$25,000, and the transfer, &c., of all present and future patents owned or to be owned by him. As a matter of fact claimant Sternbergh at no time owned patents of any kind, according to his admissions.*

The stock voted to claimant (510 shares) was given him as full paid, in accordance with an agreement dated April 20, 1900, Exhibit "C," (a copy of which is found on page 22, notes of testimony, filed July 2, 1907,) which was based on a preliminary agreement dated Feb. 13, 1900, Exhibit "B," (a copy of which is found on page 18, notes of testimony, filed July 2, 1900).

The Referee's findings of facts and conclusions of law are set out in full on page 34, et seq., of the notes of testimony, &c., taken June 21, and filed July 2, 1907. As a consequence of these findings and conclusions, the Referee refused to allow the claim of Herbert M. Sternbergh, for \$14,438.86, for use in the election of a trustee and for filing, and an order was entered on the claim accordingly.

This is the first order complained of by the petitioner Sternbergh.

At an adjourned first meeting of creditors held June 24, 1907, at 2.15 P. M., testimony was taken and evidence introduced for the purpose of attacking powers of attorney obtained from creditors by Geo. W. Wagner, Esq., an attorney for petitioning creditors, and Charles E. Duryea, a creditor of the bankrupt, which powers with proofs of claim they had offered for allowance, and which had been filed and allowed. The claims held by these men were avowedly to be used in voting for a nominee for trustee, viz., the Berks County Trust Company, opposed by the petitioner Sternbergh. Duryea and Wagner admitted having written to creditors soliciting their proxies. Letters written by Mr. Duryea, copies of which are hereto attached, and marked Exhibits "H," "I," & "J;" a letter written by W. C. Hohl at the request and suggestion of Duryea, a copy of which is hereto attached and marked Exhibit "K," and letters written by Mr. Wagner, copies of which are hereto attached and marked Exhibit "L," together with a newspaper clipping hereto attached and marked Exhibit "M," which was enclosed with the June 7th letter of Ex.

5 "L," were offered in evidence by Mr. E. H. Deysher, Esq., attorney for creditors other than Mr. Sternbergh, who was represented by Messrs. Derr & Kempp, Esqs. These letters were sent to a large number of creditors. Letters called Ex. "H," did not result in procuring of a proxy; doubtless many of the others did. The letters contain representations of what seemed to be the facts about the Duryea Power Company before it was adjudged bankrupt, and also reports of the progress of the proceedings in the Bankruptcy Court, all of them soliciting a proxy from the creditor addressed. There was no evidence as to any particular creditors to whom the letters were addressed, but the writers admitted having mailed the letters to a large number of creditors.

The findings of fact and conclusions of law, from this testimony, on this point, as delivered by the Referee, are set out in full on page 102 et seq., of the notes of testimony taken June 24, at 2.15 P. M., and filed July 2, 1900. As a consequence of these findings and conclusions, the Referee dismissed objections to the voting of the claims held by Messrs. Wagner and Duryea under powers of attorney, and allowed these proxies to be voted.

This seems to be the second order complained of by petitioner Sternbergh.

That the questions presented on this review are:

1. Did the Referee err in refusing to allow the claim of Herbert M. Sternbergh, for \$14,438.86, to be filed for voting.

2. Did the Referee err in allowing Geo. E. Wagner, Esq., and Charles E. Duryea, to vote claims under powers of attorney held by them, in election of trustee.

NOTE.—It seems to the Referee that the second question should not be certified for the reason that the ruling complained of was made on objections to powers of attorney obtained by Messrs. Wagner and Duryea, by reason of letters written creditors by them: the negative issue, that Sternbergh was prevented from obtaining 38 proofs of debt from creditors, though he had gotten their powers of attorney by reason of malicious letters written by Messrs. Duryea and Wagner, not having been before the Referee at any time, and no ruling having been made thereon.

I hand up herewith, for the information of the Court, the following papers:

1. The record book of this proceeding.
2. The petition on which this certificate is granted.
3. All other papers filed with me herein, or copies thereof which are pertinent to this review.

Respectfully submitted,

SAMUEL E. BERTOLET,  
*Referee in Bankruptcy.*

Dated July 2, 1907.

6 In the District Court of the United States for the Eastern District of Pennsylvania.

No. 2768. In Bankruptcy.

In the Matter of THE DURYEA POWER COMPANY, Bankrupt.

To Samuel E. Bertolet, Esq., Referee in Bankruptcy:

Your petitioner, H. M. Sternbergh, respectfully represents:

That he is a creditor and claimant against the estate of the above named bankrupt, and that his claim amounting to \$14,438.86 on promissory notes has been disallowed and he was not permitted to vote it at the election of Trustee.

That at the said election of trustee on June 24, 1907, there were 77 votes for the Berks County Trust Company and 76 votes for

the Pennsylvania Trust Company, which latter company is acting as Receiver of the said bankrupt.

That your petitioner intended to vote his claim for the Pennsylvania Trust Company and so announced through his attorney at the time of the election, which said vote would have tied the election as to numbers and would have prevented the election of the said Berks County Trust Company.

That your petitioner believes that his interests as an unsecured creditor will be impaired if the said bankrupt estate be administered by a Trustee other than the Pennsylvania Trust Company, which company for a number of months has been in possession of the assets as Receiver by appointment of the Court of Common Pleas of Berks County and understands the said assets and estate better than any other person could now learn to know them.

That such order was erroneous in that the Referee refused to allow the claim of your petitioner and refused to allow him to vote the said claim for Trustee upon the erroneous theory that he is indebted to the bankrupt in the sum of \$26,000 for unpaid stock subscription, while in fact, he is not indebted to said corporation in any amount whatsoever, but the said corporation is indebted to him for the amount of \$14,438.86 aforesaid, for which your petitioner is not secured.

That your petitioner has Letters of Attorney from 38 creditors, but through a misunderstanding the said creditors did not send proofs of their claims with the letters of attorney and your petitioner was prevented from securing the said proofs of said claims by malicious letters sent to said creditors by parties seeking to control the election of trustee and to prevent the election of the Pennsylvania Trust Company.

7 Wherefore, your petitioner averring that injustice has been done as he verily believes, respectfully prays that the same may be reviewed by the District Court as provided in the Act of Congress relating to bankruptcy and General Order XXVII, and that proceedings be stayed and the Berks County Trust Company be prevented from acting as trustee until such review be had by the said Court.

Witness my hand, July 21, 1907.

(Signed)

H. M. STERNBERGH.

*Petitioner.*

*Order.*

Petition for Certificate of Review granted, as of course. Petition for stay of proceedings, &c., refused.

SAMUEL E. BERTOLET, *Referee.*

*Order.*

And now, July 22, 1907, above order, inter alia refusing stay of proceedings, &c., is hereby reaffirmed, as per opinion filed this day

SAMUEL E. BERTOLET, *Referee.*

In the District Court of the United States for the Eastern District of Pennsylvania.

No. 2768. In Bankruptcy.

In the Matter of DURYEA POWER COMPANY, Bankrupt.

And now, this 15th day of July, 1907, H. M. Sternbergh hereby adds to his petition filed July 1, 1907, immediately before the prayer, the following:

Which parties also secured numerous letters of attorney from other creditors by undue means, the details of which appear in the record, so that either a new election should be ordered or the votes cast under such letters of attorney should be rejected and not counted in the election.

(Signed)

H. M. STERNBERGH.

8 BERKS COUNTY, ss:

H. M. Sternbergh, being duly sworn according to law, deposes and says that the facts set forth as they are stated above are true and correct to the best of his knowledge, information and belief.

(Signed)

H. M. STERNBERGH.

Sworn and subscribed before me this 15th day of July, 1907.

(Signed)

P. A. BUSHONG,

[SEAL.]

Notary Public.

Commission expires January 21, 1911.

Endorsed: 2768. In re Duryea Power Company, bankrupt. Addition to petition of H. M. Sternbergh, filed July 1, 1907. Filed 5 P. M., July 15, 1907.

*Order.*

And now, July 15, 1907, amendment allowed.

(Signed)

SAMUEL E. BERTOLET, *Referee.*

*Copy of Proof of Claim of Herbert M. Sternbergh.*

In the District Court of the United States for the Eastern District of Pennsylvania.

No. —. In Bankruptcy.

In the Matter of THE DURYEA POWER COMPANY, Bankrupt.

At Reading, in the County of Berks and State of Pennsylvania, in the Eastern District of Pennsylvania, on the 6th day of June, 1907, came H. M. Sternbergh of the said county and State, and says:

1. That he hereinafter designates himself as "claimant."

That said claimant is doing business at the place, county and State last aforesaid, and that the affiant is duly authorized to make this proof, and that the said bankrupt was at the time the petition in bankruptcy was filed, herein, and still is, justly and truly indebted to the said claimant in the sum of fourteen thousand four hundred and thirty-eight dollars and eighty-six cents (\$14,438.86).

9 That the consideration of said debt is as follows: Notes for which bankrupt is liable, paid by claimant, and that said debt is evidenced by certain notes, and that the average due date of said debt is — —, 190—.

That no part of said debt has been paid that there are no set-offs or counter claims to the same, and that this deponent has not or has any person for or on behalf of said claimant, or to this deponent's knowledge or belief for said claimant's use had or received any manner of security for said debt whatever, nor has any judgment been rendered therefor or for part thereof nor any note or other evidence of said debt been received except as herein stated.

H. M. STERNBERGH.

Subscribed and sworn to this 6th day of June, 1907.

JOHN K. HAHN,

*Notary Public.*

My commission will expire Feb. 2, 1910.

Proof is endorsed as follows:

United States District Court, Eastern District of Penna. In the matter of the Duryea Power Co., Bankrupt. Proof of debt. Claim of H. M. Sternbergh, Reading, Pa. Amount of debt, \$14,438.86. Filed June 6, 1907, 11 A. M.

### *Order.*

And now, June 21, 1907, 11 A. M., the within claim is disallowed for the present, especially as to voting, without prejudice to the claimant's right to present the claim hereafter. Witness my hand.

SAMUEL E. BERTOLET, *Referee.*

Attached to proof are copies of the original notes, as follows:

### *Copies of Notes.*

\$1400.

READING, PA, Aug. 23, 1906.

On remand after date we or either of us jointly and severally promise to pay to the order of the Duryea Power Co., fourteen hundred dollars, at First National Bank of Reading, without defalcation, for value received.

(Signed)

H. M. STERNBERGH.

(Signed)

CHAS. E. DURYEA.

10

Endorsed: Duryea Power Co., by H. M. Sternbergh, Pres.  
C. E. Duryea, V. P. Interest paid to Jan. 1, 1907, \$30.33.



\$1500.00.

READING, PA., Aug. 25, 1906.

On demand after date we or either of us jointly and severally promise to pay to the order of Duryea Power Co. Fifteen hundred and 00/100 dollars, at First National Bank of Reading, without defalcation, for value received.

(Signed)

H. M. STERNBERGH.

(Signed)

CHAS. E. DURYEA.

Endorsed: Duryea Power Co., by H. M. Sternbergh, Pres. C. E. Duryea, V. P. Int. paid to Jan. 1, 1907, \$31.50.

\$1550.00.

READING, PA., December 3, 1906.

Four months after date I promise to pay to the order of Duryea Power Co., at the First National Bank of Reading, Fifteen Hundred and Fifty 00/100 dollars, without defalcation, for value received.

HENRY DICKINSON.

Endorsed: Duryea Power Co., per H. M. Sternbergh, Pres. H. M. Sternbergh. 31.52.

\$2500.00. 16.13.

PAWTUCKET, R. I., Dec. 24, 1906.

Ninety days after date I promise to pay to the order of Duryea Power Co. Ten Hundred Sixty-three and 86/100 Dollars at First National Bank of Reading, Pa., value received. 10302. 3/26.

C. O. TERWILLIGER.

Endorsed: Duryea Power Co., per H. M. Sternbergh, Pres. H. M. Sternbergh, C. E. Duryea.

\$650.00. 9.75.

MANNINGTON, W. VA., Jan'y 7th, 1907.

Three months after date I promise to pay to the order of Duryea Power Co. Six hundred Fifty & 00/100 Dollars at the First National Bank of Mannington, W. Va., without defalcation, value received. Mannington, W. Va., 4/8, 1907.

W. H. LEBENDORFER.

11 Protested for Non-payment, 123 4/7 (No charge.)

E. B. KOEN,

Notary Public.

Endorsed: Duryea Power Co., by H. M. Sternbergh Pres., H. M. Sternbergh, Chas. E. Duryea.

\$1275.00. 13.17.

EASTON, PA., Jan. 16th, 1907.

Two month- after date I promise to pay to the order of Duryea Power Co. One Thousand two hundred and seventy-five Dollars at the Northampton National Bank, without defalcation, for value received. 271 3/16.

JOHN WALZ.

Endorsed: Duryea Power Co., by H. M. Sternbergh, Pres., H. M. Sternbergh.

\$2500.00.

READING, PA., Jan'y 16, 1907.

Two months after date we or either of us jointly and severally promise to pay to the order of Duryea Power Co. Two thousand five hundred and 00/100 dollars, at First National Bank of Reading, without defalcation, for value received. 192 3/16.

H. M. STERNBERGH.  
CHAS. E. DURYEA.

Endorsed: Duryea Power Co., by H. M. Sternbergh, Pres. C. E. Duryea, V. P.

\$2000.00.

READING, PA., Feb'y 4, 1907.

Ninety days after date we or either of us jointly and severally promise to pay to the order of Duryea Power Co. Two Thousand and 00/100 dollars at First National Bank of Reading, without defalcation, for value received. 442 5/5.

H. M. STERNBERGH.  
CHAS. E. DURYEA.

Endorsed: Duryea Power Co., by H. M. Sternbergh, Pres. C. E. Duryea, V. P.

*Copy of Exceptions to Claim of H. M. Sternbergh. Filed 11:30 a. m., June 20, 1907.*

12 In the District Court of the United States for the Eastern District of Pennsylvania.

In re DURYEA POWER COMPANY.

*Exceptions to Claim of Herbert M. Sternbergh.*

And now, to wit, June 20, 1907, Roger C. Aldrich and the Excelsior Brass Works, Creditors, by their attorney and attorney-in-fact, Geo. W. Wagner, for their own benefit as creditors, and also for the benefit of all other creditors of the said Duryea Power Company, herewith file exceptions as follows to the claim of Herbert M. Sternbergh for fourteen thousand four hundred and thirty-eight dollars and eighty-six cents.

1. The said Herbert M. Sternbergh's claim should not be allowed for the reason that he is indebted to the corporation for the benefit of creditors of said corporation the sum of \$26,000, being the unpaid balance due on \$51,000 par of Capital Stock subscribed for by the said Herbert M. Sternbergh and issued by said Company to him.

2. The said claim of Herbert M. Sternbergh should not be allowed until the said Herbert M. Sternbergh has paid into the Company for the benefit of the creditors of the Duryea Power Company, \$26,000, being the unpaid balance due on his subscription to Capital Stock.

3. The said claim of Herbert M. Sternbergh cannot be allowed by the Referee for the reason that the said Duryea Power Company is insolvent, having an indebtedness as appears by the Schedules filed

in the estate of the Duryea Power Company, bankrupt, of \$105,384.40, with assets on hand of only \$52,012.95 or as appears by the Inventory and Appraisement filed in said estate in the Common Pleas Office of Berks County of only \$42,218.63.

4. That it will require the full amount of the unpaid subscription to the capital stock of \$26,000 of Herbert M. Sternbergh, and more, to pay the indebtedness of said bankrupt.

ROGER C. ALDRICH &  
EXCELSIOR BRASS WORKS,

By Their Attorney, GEO. W. WAGNER.

In the District Court of the United States for the Eastern District of Pennsylvania.

No. 2768. In Bankruptcy.

In the Matter of DURYEA POWER CO., Bankrupt.

13

*Referee's Certificate of Notice, &c.*

At Reading, Pa., in district aforesaid, I Samuel E. Bertolet, Referee in Bankruptcy, hereby certify:

That notices, a copy whereof is hereto attached, were on May 25, 1907, sent by mail to all creditors named in the bankrupt's schedules to their addresses as they appear there, and to all parties interested, by inserting same in official business envelopes and depositing them on the above date, in mail boxes placed for the reception of U. S. Mail.

And further, that a notice, a copy whereof is hereto attached was inserted in the Reading Daily Eagle, on May 24, 1907.

Witness my hand.

(Signed)

SAMUEL E. BERTOLET,  
*Referee in Bankruptcy.*

Copy.

*(Notice in Reading Daily Eagle.)*

United States District Court, Eastern District of Pennsylvania.

No. 2768. In Bankruptcy.

In the Matter of DURYEA POWER CO., Bankrupt, of Reading, Pa.

Notice is hereby given creditors of said Bankrupt, that on May 1, 1907, the said Duryea Power Co., was adjudged involuntary bankrupt, and that the first meeting of creditors will be held at the Referee's office, 536 Court st., Reading Pa., on June 6, 1907, at 11 A. M., at which time and place said creditors may attend, prove their claims, examine the bankrupt and transact such other business as may properly come before said meeting.

Dated May 24, 1907.

SAMUEL E. BERTOLET,  
*Referee in Bankruptcy.*

*(Notice Sent by Mail.)*

United States District Court, Eastern District of Pennsylvania.

No. 2768. In Bankruptcy.

In the Matter of DURYEA POWER Co., Bankrupt, of Reading, Pa.

Notice is hereby given creditors of said bankrupt, that, on May 1, 1907, the said Duryea Power Co., was adjudged involuntary bankrupt, and that the first meeting of creditors will be held at the referee's office, 536 Court st., Reading, Pa., on June 6, 1907, at 11 A. M., at which time and place said creditors may  
14 attend, prove their claims, examine the bankrupt, and trans-act such other business as may properly come before said meeting.

SAMUEL E. BERTOLET,  
*Referee in Bankruptcy.*

Endorsed: 2768. In re Duryea Power Co., Bankrupt. Referee's certificate of mailing and publishing notice of first meeting of creditors, &c. Filed 12 M., May 25, 1907.

*Appointment of Trustee by Creditors.*

In the District Court of the United States for the Eastern District of Pennsylvania.

No. 2768. In Bankruptcy.

In the Matter of DURYEA POWER Co., Bankrupt.

At Reading in the said District, on the 6th, 20th, 21st, 22d and 24th days of June, A. D. 1907.

Before S. E. Bertolet, Referee in Bankruptcy.

These being the days appointed by the Court for the first and adjourned first meetings of creditors in the above bankruptcy, and of which due notice has been given in the (1) Reading Daily Eagle, the newspaper designated for official publications, and by mail to all creditors, we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said Bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint The Berks County Trust Company of Reading in the County of Berks and State of Penna., to be the Trustee of the said Bankrupt's estate and effects.

Signatures of Creditors.	Residence.	Amt. of Debt.
Howard Rockefeller, by his Attorney, Andrew A. Leiser.....	Butte, Montana .....	
	Lewisburg, Un. Co., Pa., .....	\$2200.00
F. W. Bacon, by his Attorney, Andrew A. Leiser.....	Butte, Montana .....	
	Lewisburg, Un. Co. Pa., .....	400.00
F. W. Pickering, by Snyder & Zieber, Attorneys. ....	Boston, Mass. ....	200.00
Sharman & Hauber, by Wellington M. Bertolet, Attorney.	Reading, Pa., .....	1017.90
15 American Vulcanized Fibre Co., by Randolph Stauffer, Att'y .....	Wilmington, Del. ....	28.50
Dives, Pomeroy & Stewart, by Randolph Stauffer, Attorney...	Reading, Pa. ....	22.50
The Hartford Rubber Works Co., by Harry J. Dumm, Att'y.....		\$3478.92
Flood & Conklin Co., per Randolph Stauffer, Att'y.....	Newark, N. J. ....	611.25
Reading Scale & Machine Co., per W. Abbott Witman, Jr., Attorney.....	Reading, Pa., (Unpreferred).....	40.00
H. C. Franke, by his Att'y., William Rick .....		1400.00
James F. Martine.....	Orange, N. J. ....	1260.35
Knauth, Nochod & Kuhne, by Att'y in fact. ....	New York City.....	143.36
Charles E. Duryea.....	Reading, Pa. ....	
Charles E. Duryea.....	Reading, Pa. ....	18953.65
Baldwin Chain & M'f'g Co.....	Worcester, Mass. ....	170.85
B. F. Owen & Co.....	Reading, Pa. ....	273.85
Excelsior Brass Works.....	Reading, Pa. ....	104.52
Sims Kent Co.....	Dover, N. J. ....	1.00
Joseph O. Flatt & Co.....	Reading, Pa. ....	26.66
Ott. Mergenthaler & Co.....	Baltimore, Maryland.	77.01
Ellis & Cummings.....	Reading, Pa. ....	506.95
Charles H. Schlegel.....	Mt. Penn. Pa. ....	50.00
Brown Lipe Gear Co.....	Syracuse, N. Y. ....	53.03
The English & Mersick Co.....	New Haven, Conn....	20.25
Field & Co., Incorporated.....	52 N. 5th st., Phila..	392.30
Chantrell Tool Co.....	Reading, Pa. ....	682.43
Cascaden Vaughn Co.....	Waterloo, Iowa.....	312.32
Standard Tool Co.....	Cleveland, Ohio.....	4.94
W. H. Wilford.....	Bangor, Pa. ....	50.00
American Motor Co. M'f'g Ass'n	N. Y. City.....	250.00
George A. Hebb.....	70 Williams st., Newark, N. J. ....	34.72
P. S. Malcolm.....	Portland, Oregon.....	500.00
Albert S. Power.....	Providence, R. I. ....	500.00
Hercules Electric Co.....	Indianapolis, Ind....	227.50
C. F. Hill.....	Easton, Pa. ....	74.10

Signatures of Creditors.	Residence.	Amt. of Debt.
Houghton & Richards.....	Boston, Mass.....	\$177.39
Capitol Foundry Co.....	Hartford, Conn.....	1190.74
Reuben Hoffa .....	Reading, Pa.....	290.11
S. M. Heim.....	Reading, Pa.....	1225.00
Charles F. Hoverter.....	Reading, Pa.....	243.50
E. H. Zacharias.....	Reading, Pa.....	6.00
16 Albright & Shenton.....	Reading, Pa.....	486.80
J. G. Speidel.....	Reading, Pa.....	210.42
Reading Rubber Stamp Works..	Reading, Pa.....	3.25
Chas. H. Fuller Co.....	Chicago, Ill.....	52.12
Whitney Manufacturing Co.....	Hartford, Conn.....	19.00
The William Cramps' Sons Ship & Engine Building Co.....	Philadelphia, Pa.....	134.44
Medical World.....	Philadelphia, Pa.....	81.00
Tuthill Spring Co.....	Chicago, Ill.....	121.94
Ketterlinus Lithographing M'fg Co.....	Philadelphia, Pa.....	165.00
H. J. Heck.....	Reading, Pa.....	12.63
F. S. Wertz & Co.....	Reading, Pa.....	114.00
Textile Machine Works.....	Reading, Pa.....	251.86
American Cost Accounting Co...	New York City.....	266.00
Knobloch-Heideman M'fg Co.....	South Bend, Ind.....	49.60
Roger C. Aldrich.....	Elizabeth, N. J.....	11505.87
E. S. Youse.....	Reading, Pa.....	51.65
United States Graphite Co.....	Saginaw, Mich.....	1.24
Boston Gear Works.....	Boston, Mass.....	68.00
Pantasote Company.....	New York City.....	66.00
Phineas Jones & Co.....	Newark, N. J.....	65.12
James Freeman.....	Mullington, Morris Co., N. J.....	35.00
M. Moyer & Son.....	Reading, Pa.....	7.77
Kline & Co.....	Reading, Pa.....	142.79
Morse Chain Co.....	Ithaca, N. Y.....	97.09
H. W. Crooks.....	Reading, Pa.....	40.24
Charles T. Heckler.....	Reading, Pa.....	2.03
Greth Machine Works.....	Reading, Pa.....	32.45
J. M. Reifsnyder.....	Reading, Pa.....	14.52
W. H. Lemont.....	Kalamazoo, Mich.....	500.00
Aeme Steel & Malleable Iron Works.....	Buffalo, N. Y.....	209.12
W. L. Perrin.....	New York.....	9.00
American Motor League.....	132 Nassau st., N. Y..	12.00
Wayne Kratzer.....	New York.....	319.62
A. G. Spalding & Co.....	New York.....	34.50
Irvin Shanaman.....	Reading, Pa.....	450.00
Robert De Mart.....	Reading, Pa.....	127.69
Beckwith-Chandler Co.....	Newark, N. J.....	35.25

By their Attorneys in Fact.

GEO. W. WAGNER, *Reading, Pa.*

CHARLES E. DURYEA, *Reading, Pa.*

17 Ordered that the foregoing appointment of Trustee be, and the same is hereby approved.

SAMUEL E. BERTOLET,  
*Referee in Bankruptcy.*

In the District Court of the United States for the Eastern District of Pennsylvania.

No. 2768. In Bankruptcy.

In the Matter of DURYEA POWER CO., Bankrupt.

*Trustee's Acceptance.*

And now, to wit, June 28, 1907, the Berks County Trust Company herewith files its acceptance to act as Trustee in the matter of the Duryea Power Company, Bankrupt.

In witness whereof it has hereunto set its seal the day and year aforesaid.

(Signed)

THE BERKS COUNTY TRUST CO.,  
M. A. GHERST, *Secretary.* [SEAL.]

In the District Court of the United States for the Eastern District of Pennsylvania.

No. 2768. In Bankruptcy.

In the Matter of DURYEA POWER CO., Bankrupt.

*Opinion and Order on Petition of Creditor for Stay of Proceedings and for Prevention of Berks County Trust Company Acting as Trustee.*

On June 24, 1907, the Berks County Trust Company was declared elected trustee of the above named bankrupt, and the referee ordered the election closed. The referee then signed an order approving the election, and next day notified said Trustee. On June 28 the Trust Company filed with the referee its acceptance of the trust. On July 1, H. M. Sternbergh, a creditor dissatisfied with the conduct and result of the election of the trustee, and with the action of the referee in refusing him the right to vote a claim proved up by him, 18 &c., filed his petition for a certificate of review. The prayer of the petition also included a prayer that all proceedings pending the review be stayed and the Berks County Trust Company be prevented from acting as Trustee in the interim. The referee granted the petition for review as of course, but refused the prayer for stay, &c. This refusal was based on the referee's doubt as to his jurisdiction. H. M. Sternbergh, on July 9, filed his application for a re-hearing of his petition to stay proceedings, and hearing thereon was had July 15. The referee admitted jurisdiction and heard argument on the merits of the petition, decision being reserved.

I have before me, as I write this, the words of a learned brother, Referee Hunter of Philadelphia County, on this subject. He says: "I am quite clear that a trustee apparently elected and duly qualified should be permitted to proceed with his administration of the estate, pending any action upon a certificate of review. I have always ruled that the Act is a business statute intended for the convenience of creditors and the expeditious transaction of business; and I see no reason, even if there should be an ultimate change of Trustee, for subjecting the bankrupt estate to an interregnum which might work prejudicially to creditors."

I cannot better express my own views of this matter than by using the words of the learned referee, quoted above; whose opinions in bankruptcy causes before him are entitled to and receive much consideration and respect, at the hands both of the bar of his county and the Courts of review.

I believe that no good can, and some harm may, come from preventing an apparently elected, and a qualified, trustee, from administering the estate. Likewise, I can conceive of no harm likely to befall the petitioners or creditors if the trustee now in charge, is permitted to remain. This trustee can do no acts not in accordance with the law. His duties are clearly defined in the Act of 1898, and he may not depart from the lines there laid down. If he does, every creditor or party injured, has his remedy. The petitioner is not more likely to be injured by the present trustee than by any former or later administrator of the estate. All are alike, under the same law, their duties are similar, the end in view the same. One may be removed but his removal does not change the rights, powers, or duties of his successor, nor are his own rights, powers, duties or liabilities changed thereby. The trustee, whoever he may be now, or whoever may become so hereafter, can neither favor nor injure the petitioner. If the referee erred in not allowing the petitioner to vote his claim, and thereby injured him in his right to vote, the District Court will correct the error, and restore his right. He will then have all he has lost.

Even if this reasoning should be fallacious, that will not  
19      lessen the force and effect of the principle set forth in the  
second paragraph of this opinion, to which principle I subscribe.

It follows therefore that the order entered on the petition of July 1, praying, *inter alia*, for a stay of proceedings, &c., which order disallowed said stay and refused to prevent the trustee from administering the bankrupt's estate, must be re-affirmed, and the petition praying for a re-consideration of said order must be dismissed.

Orders will be entered accordingly.

Witness my hand, this July 22, 1907.

SAMUEL E. BERTOLET,  
*Referee in Bankruptcy.*



*Copy of Exhibit "A."*

OFFICE OF DURYEA POWER COMPANY,  
READING, PA., April 20, 1900.

I hereby certify that the following resolution was adopted at a meeting of the Board of Directors of this Company, held on the 20th of April, 1907.

Resolved, That a meeting of stockholders be called to convene at the general office of the Company, on the 20th day of April, 1900, to take action on the approval or disapproval of the proposed increase of the capital stock of the said company from \$1000 to \$100,000, and that the secretary be and is hereby directed to give notice thereof as required by law, unless the same be waived by the unanimous consent of the stockholders.

Attest:

[CORPORATE SEAL.] HENRY MILHOLLAND, *Secretary.*

*Waiver of Sixty Days' Notice.*

READING, PA., April 20, 1900.

The undersigned, stockholders in the Duryea Power Company, who are all the stockholders therein and holders of all the stock of said company to the amount set opposite our several names, to wit:

Name.	No. of Shares.
Herbert M. Sternbergh.....	4
Charles E. Duryea.....	3
Henry Milholland.....	1
Adam L. Otterbein.....	1
Cameron E. Strauss.....	1

20 do hereby waive the sixty days' notice of the meeting of stockholders called for April 20, 1900, required to be given by the seventh section of the sixteenth article of the Constitution of the State of Pennsylvania, and do hereby signify by this paper our assent to the increase of the capital stock of said company from \$1000 to \$100,000, and desire that the same may be taken as our vote in favor thereof, with like effect as if all the provisions of the Act of Assembly, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved 29th April, 1874, relative to the increase of the capital stock had been fully complied with.

STATE OF PENNSYLVANIA,  
*County of Berks, ss:*

I, Henry Milholland, Secretary of the Duryea Power Company, being duly sworn, do depose and say that I am the Secretary of the said company, that the stock ledger of said company is in my custody and under my control, and that the list of stockholders given in the

above waiver of notice of a meeting to be held to vote for or against increase of capital stock, is a complete list of such stockholders, and that they are the owners of the entire issue of the stock of said company, and that the signatures to said waiver are genuine and in the proper handwriting of the subscribers.

HENRY MILHOLLAND, *Secretary.*

Sworn and subscribed before me this 20th day of April, 1900.

WOOD M. SCHWARTZ,  
*Notary Public.*

[SEAL.]

STATE OF PENNSYLVANIA,  
*County of Berks, ss:*

On this twentieth day of April, 1900, personally appeared before me, a Notary Public, in and for the County aforesaid, Herbert M. Sternbergh, Charles E. Duryea and Henry Millholland, stockholders, duly appointed judges by the Board of Directors of the Duryea Power Company to conduct an election of said company to be held on the twentieth day of April, 1900, who being duly sworn or affirmed, do depose and say that they will well and truly, according to law, conduct said election to the best of their ability and true return make of the same.

HERBERT M. STERNBERGH,  
CHARLES E. DURYEA,  
HENRY MILHOLLAND,  
*Judges.*

21 Sworn and subscribed before me day and year aforesaid.

WOOD M. SCHWARTZ, JR.,  
*Notary Public.*

[SEAL.]

We, the undersigned judges, appointed by the Board of Directors of the Duryea Power Company to conduct an election by the stockholders thereof, for or against increase of the capital stock of the said company, from \$100 to 100,000, do hereby certify, that, after being duly sworn, we held the said election at the office of said company on the 20th day of April, 1900, the time and place fixed for holding the same, of which sixty days' notice by publication was duly waived, and in due form and manner we received the votes of the stockholders of the said company in favor of or against such increase and at said election there were voted in favor of said increase, ten shares, and against said increase, no shares, thereby evincing the consent to the said increase of capital stock of the persons or bodies corporate holding the larger amount in value of the capital stock of said company.

HERBERT M. STERNBERGH,  
CHARLES E. DURYEA,  
HENRY MILHOLLAND,  
*Judges.*

Endorsed: Election return, with waiver. Filed in the office of the Secretary of the Commonwealth, on the 27th day of April, A. D. 1900. Lewis E. Beitler, Dep. Sec. of the Commonwealth. Recorded in Miscellaneous Corporation Record Book No. 22, page 293.

To the Hon. W. W. Greist, Secretary of the Commonwealth:

This is to certify that by virtue of the consent of the stockholders of the Duryea Power Company, authorizing an increase in the capital stock thereof, from \$1000 to \$100,000, given at an election duly held for that purpose, on the 20th day of April, 1900, the capital stock of said company has been increased from \$1000 to \$100,000 said additional stock being issued for cash and property.

[SEAL.]

H. M. STERNBERGH, *President.*

STATE OF PENNSYLVANIA,

*County of Berks, ss:*

22 Henry Milholland, Treasurer of the Duryea Power Company, above named, being duly sworn, says the facts set forth in the above certificate are correct and true.

HENRY MILHOLLAND.

Sworn and subscribed before me this 29th day of October, 1900.

[SEAL.]

ADAM L. OTTERBEIN,  
*Notary Public.*

Endorsed: Filed in the office of the Secretary of the Commonwealth on the 31st day of October, 1900. Lewis E. Beitler, Dep. Sec. of the Commonwealth. Recorded in Miscellaneous Corporation Book No. 27, page 82.

OFFICE OF THE SECRETARY OF THE  
COMMONWEALTH OF PENNSYLVANIA,  
HARRISBURG, *March 6, 1907.*

PENNSYLVANIA, *ss:*

I do hereby certify, That the foregoing and annexed is a full, true and correct copy of the Election Return authorizing an increase of capital stock of the Duryea Power Company, together with return of actual increase thereon, as the same appear of record and remain on file in this office.

In Testimony Whereof, I have hereunto set my hand and caused the seal of the Secretary's Office to be affixed, the day and year above written.

[SEAL.]

LEWIS E. BEITLER,  
*Deputy Sec. of the Commonwealth.*

Exhibit "B" found on Page 18 of Notes of Testimony and filed July 1, 1907.

Exhibit "C" found on page 22.

*Copy of Part of Exhibit "D," Minutes of Duryea Power Company  
of April 20, 1900, Page 9 of Minute Book.*

OFFICE DURYEA POWER COMPANY,  
READING, PA., April 20, 1900.

A meeting of the Board of Directors was held this day. Present: Messrs. Herbert M. Sternbergh, Charles E. Duryea, and Henry Milholland, being all the members.

23 The following officers were elected to serve until the next annual meeting or until their successors are duly elected and qualified.

President, Herbert M. Sternbergh.

Vice-President, Charles E. Duryea.

Secretary and Treasurer, Henry Milholland.

On motion the following resolution was unanimously adopted:

Resolved that a meeting of the stockholders be called to convene at the general office of the company on the 20th day of April, A. D., 1900, to take action on approval or disapproval of the proposed increase of the capital stock of said company from \$1000 to \$100,000 and that the secretary is hereby directed to give notice thereof as required by law, unless the same be waived by the unanimous consent of the stockholders, and that Herbert M. Sternbergh, Charles E. Duryea and Henry Milholland be appointed judges to conduct the said election.

On motion, adjourned.

HENRY MILHOLLAND, *Secretary.*

STATE OF PENNSYLVANIA,  
*County of Berks, ss:*

Henry Milholland, secretary above named being duly sworn according to law says he will perform the duties of secretary of Duryea Power Company with fidelity.

HENRY MILHOLLAND.

Sworn and subscribed before me this 26th day of April, A. D., 1900.

ADAM L. OTTERBEIN,  
*Notary Public.*

OFFICE OF DURYEA POWER COMPANY, April 20, 1900.

A special meeting of the stockholders of the Duryea Power Company was held at the principal office of the company in Reading, Pa., on the 20th day of April, A. D., 1900, at 2 o'clock P. M., pursuant to the following resolution of the Board of Directors passed at a duly convened meeting thereof:

(Here follows the resolution as above set forth.)

Notice of the said meeting was waived by all the stockholders in writing:

24 The holders of all the shares were present in person, Mr. Herbert M. Sternbergh was called to the chair and Mr. Henry Milholland acted as Secretary.

The judges respectively took and subscribed an oath according to law well and truly to conduct such election to the best of their ability and true return make of the same.

The president of the company furnished to the judges of election a statement of the amount of capital stock of the company with the names of the persons or bodies corporate holding the same, and number of shares by each respectively held, which statement was signed by the Secretary with his affidavit thereto annexed that the same was true and correct to the best of his knowledge and belief.

The following resolution being offered it was, on motion, resolved to proceed to a stock vote by ballot thereon.

Resolved, that the Board of Directors be and they hereby are authorized to increase the capital stock from \$1000 to \$100,000.

A vote by ballot was then taken on said resolution and the judges having counted the ballots declared that the holders of ten shares had voted in favor of said resolution and such increase and the holders of no shares had voted against such increase, and that therefore the persons or bodies corporate holding the larger amount of the capital stock of the company had consented to such increase.

Duplicate returns of said election to increase the capital stock were made out by the judges and subscribers and delivered to the president of the company.

On motion adjourned.

HENRY MILHOLLAND,  
*Secretary.*

*Copy of Exhibit "E."*

**Charter.**

To the Governor of the Commonwealth of Pennsylvania.

SIR: In compliance with the requirements of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the incorporation and regulation of certain corporations" approved the 29th day of April, A. D. 1874, and the several supplements thereto, the undersigned, all of whom are citizens of Pennsylvania, having associated themselves together for the purpose hereinafter specified, and desiring that they may be incorporated, and that letters patent may issue to them and to their successors according to law, do hereby specify:

25 1. The name of the proposed corporation is Duryea Power Company.

2. Said corporation is formed for the purpose of the manufacture of iron or steel or both, or any other metal, or of any article of commerce from metal or wood or both, including automobiles, motors, propellers and parts of either.

3. The business of said corporation is to be transacted in the City of Reading, Pa.

4. Said corporation is to exist perpetually.

5. The names and residences of the subscribers and the number of shares subscribed by each, are as follows:

Name	Residence	No. of Shares
Herbert M. Sternbergh,	Reading, Penna.	4
Charles E. Duryea,	Reading, Penna.	3
Henry Milholland,	Reading, Penna.	1
Adam L. Otterbein,	Reading, Penna.	1
Cameron E. Strauss,	Reading, Penna.	1

6. The number of directors of said corporation is fixed at three, and the names and residences of the directors who are chosen directors for the first year, are as follows:

Name	Residence
Herbert M. Sternberg,	Reading, Penna.
Charles E. Duryea,	Reading, Penna.
Henry Milholland,	Reading, Penna.

7. The amount of the capital stock of the said corporation is \$1,000, divided into 10 shares of the par value of \$100, and \$100 being ten per centum of the capital stock has been paid in cash to the Treasurer of said corporation, whose name and residence are: Henry Milholland, Reading, Penna.

HERBERT M. STERNBERGH.	[SEAL.]
CHARLES E. DURYEA.	[SEAL.]
HENRY MILHOLLAND.	[SEAL.]
ADAM L. OTTERBEIN.	[SEAL.]
CAMERON E. STRAUSS.	[SEAL.]

STATE OF PENNSYLVANIA,

*County of Berks, ss:*

Before me, a notary public, in and for the County aforesaid, personally came the above named Herbert M. Sternbergh, Charles E. Duryea, and Henry Milholland, who in due form of law acknowledged the foregoing instrument to be their act and deed for the purposes therein specified.

26 Witness my hand and seal of office, the 6th day of Mar.,

A. D. 1900.

[SEAL.]

WOOD M. SCHWARTZ, JR.,

*Notary Public.*

STATE OF PENNSYLVANIA,

*County of Berks:*

Personally appeared before me, this 6th day of March, A. D. 1900, Herbert M. Sternbergh, Charles E. Duryea and Henry Milholland, who being duly sworn according to law, depose and say that the statements contained in the foregoing instrument are true.

HERBERT M. STERNBERGH.
CHARLES E. DURYEA.
HENRY MILHOLLAND.

Sworn and subscribed before me the day and year aforesaid.

[SEAL.]

WOOD M. SCHWARTZ, JR.,  
Notary Public.

Endorsements.

*Application of Duryea Power Company.*

EXECUTIVE CHAMBER, HARRISBURG, April 6, 1900.

To the Secretary of the Commonwealth:

Having examined the within application and found it to be in proper form and within the purposes of the class of corporations specified in Section two of the Act, entitled "An Act to provide for the incorporation and regulation of certain corporations" approved April 29, A. D. 1874, and the several supplements thereto, I hereby approve the same, and direct that letters patent issue according to law.

WILLIAM A. STONE, *Governor.*

Secretary's Office.

PENNSYLVANIA, ss:

Enrolled in Charter Book No. 57, page 157.

Witness my hand and seal of office, at Harrisburg, this 6th day of April, A. D. 1900.

[SEAL.]

W. W. GREIST,  
*Secretary of the Commonwealth.*

27 Recorded in the office for recording deeds, &c., in and for Berks County, Pa., in Charter Book No. 5, page 9.

Witness my hand and seal of office this 10th day of April, A. D. 1900.

[SEAL.]

DANIEL H. REESER, *Recorder.*

*Copy of Exhibit "F."*

Stock Certificate Book. Certificate No. 1.

*Stub.*

Duryea Power Company, Certificate No. 1 for 510 shares, issued to Herbert Sternbergh, dated Oct. 27, 1900.

From whom transferred, original issue, dated Oct. 27, 1900.

No. Original Certificate.	No. Original Shares.	No. of shares transferred.
1	510	—

Received certificate No. 1 for 510 shares, this 27th day of Oct. 1900.

(Signed)

H. M. STERNBERGH.

*Certificate.*

Incorporated under the Laws of the State of Pennsylvania.

Number.

1

Shares.

510

Duryea Power Company.

Capital, \$100,000.

This certifies that Herbert M. Sternbergh is entitled to five hundred and ten shares of the Capital stock of Duryea Power Company.

Transferable only on the books of said company in person or by Attorney, upon surrender of this certificate.

Witness the Corporate Seal of the said company and the signatures of the President and Treasurer, this twenty-seventh day of October, A. D. 1900.

H. M. STERNBERGH, *President.*

[SEAL.]

HENRY MILHOLLAND, *Treasurer.*

28

Shares, \$100 each.

\$25.50 Internal Revenue Stamps on back.

(The word "cancelled" is written across the face of the certificate, and across the signatures thereto; also word "void.")

*Agreement Offered in Evidence, Marked Exhibit "G."*

(Copy.)

This agreement, made the eleventh day of June, A. D. one thousand nine hundred, between Charles E. Duryea of the City of Reading, in the County of Berks and State of Pennsylvania, and the Duryea Manufacturing Company of Peoria, Illinois, of the one part, and the Duryea Power Company, a corporation of the State of Pennsylvania, of the other part, witnesseth

The said Charles E. Duryea and the said Duryea Manufacturing Company of Peoria, Illinois, hereby license and empower the said Duryea Power Company, its successors and assigns, to manufacture and sell under all patents and inventions now controlled by said Charles E. Duryea or by the said Duryea Manufacturing Company, pertaining to the manufacture and use of motors, propellers and light automobiles, (by which is understood pleasure carriages designed to carry six persons or less, and grocers' and butchers' or similar weight delivery wagons) or parts of either, and under all patents and inventions of the description aforesaid at present owned by the said Charles E. Duryea or by the said Duryea Manufacturing Company and the said Charles E. Duryea, for himself, his heirs, executors and administrators, and the said Duryea Manufacturing Company, for itself and its successors, further agree to



license and empower the said Duryea Power Company, its successors and assigns, to manufacture and sell under all patents and inventions of the description aforesaid which may be hereafter controlled by either of them or which either of them shall hereafter make or acquire and all patents which may be granted therefor, and shall not suffer any other person, firm or corporation east of the meridian of the eastern boundary line of the State of Ohio, by license, transfer of patents or otherwise to use any such present or future patents or inventions for the purpose of manufacturing light automobiles; it being further agreed that if said Duryea Power Company, its successors or assigns, at the end of twenty-one months from its incorporation is not reasonably supplying the demand for any particular style of light vehicle except its two leading styles, the said Charles E. Duryea and the said Duryea Manufacturing Company shall have the right to license elsewhere its manufacture, and the said Charles

29 E. Duryea, for himself, his heirs, executors and administrators and the said Duryea Manufacturing Company, for itself, and its successors, further agree at the expense of the said Duryea Power Company, its successors and assigns, whenever thereunto requested from time to time to do and perform or cause to be done and performed all such acts and execute all such instruments of writing as said Duryea Power Company, its successors and assigns, may reasonably require for the purpose of fully carrying out the true intent of this agreement.

In consideration whereof, the said Duryea Power Company has paid to the parties of the first part, the sum of one thousand (1,000) dollars, lawful money of the United States of America, the receipt whereof is hereby acknowledged, and has made and delivered to the said Charles E. Duryea, payable to his order, its promissory notes as follows:

Note for \$1,000, payable as soon as said Charles E. Duryea shall demonstrate that said Duryea Power Company is exempt from suit by the Peoria Rubber and Manufacturing Company as hereafter set forth: Note for \$2,000, payable October 6, 1900; Note for \$2,000, payable April 6, 1901; Note for \$2,000, payable July 6, 1901; Note for \$2,000, payable October 6, 1901; and has issued to the said Charles E. Duryea three hundred (300) full paid shares of the capital stock of the Duryea Power Company, including three (3) shares now standing in the name of the said Charles E. Duryea on the books of the said company, the receipt of which notes and stock is hereby acknowledged.

It is further agreed that the said Charles E. Duryea shall furnish full and complete sets of drawings or blue prints covering all designs, parts and necessary information requisite for the manufacture of motors and vehicles and shall serve the said corporation, its successors or assigns, for the greater part of his time or at least seven-teen days in each month for the term of at least one year after its incorporation at the rate of compensation of two hundred and fifty dollars per month, and so long thereafter as may be mutually agreed upon.

It is further agreed that said Charles E. Duryea shall protect the

Duryea Power Company and its successors and assigns from and indemnify it against all suits and demands by the Peoria Rubber and Manufacturing Company, its successors and assigns, on account of any claims by it or them arising from previous contracts between the said Charles E. Duryea or the Duryea Manufacturing Company and the said Peoria Rubber and Manufacturing Company to the rights herein granted, and shall secure his performance of this contract by pledging to the Duryea Power Company, its successors and assigns, the stock and notes which he is entitled to receive under this agreement until its exemption from such suits shall be demonstrated.

30 In witness whereof, the said Charles E. Duryea has hereunto set his hand and seal and said Duryea Manufacturing Company and Duryea Power Company acting by their respective Presidents and Secretaries thereunto, duly authorized by proper corporate action, have hereunto affixed their corporate seals, duly attested, the day and year first above written. Date changed before signing.

CHARLES E. DURYEA. [SEAL.]  
DURYEA MANUFACTURING CO.,

By D. S. BROWN, *Its Pres't.*

Attest:

RUDOLF REIFFER, *Secretary.*  
DURYEA POWER CO.,

By H. M. STERNBERGH, *Pres't.*

Attest:

H. MILHOLLAND, *Sec'y.*

Signed, sealed and delivered in the presence of

EVA A. RUTH.  
EDNA B. TURNBULL.  
Mrs. W. E. HOWE.  
EVA A. RUTH.

Endorsed: (Copy) Agreement. Charles E. Duryea and Duryea Manufacturing Company and Duryea Power Company. (Exhibit "G." C. E. Y.)

*Copy of Letter Marked Exhibit "H," C. E. Y.*

Wadsworth, Blackmon & Wadsworth, att'ys, Buffalo, N. Y.

GENTLEMEN: The entire property was appraised at \$42,218. An issue of \$100,000 bonds was attempted last fall, but only \$28,500 were sold. These are controlled by Mr. Middleby who offers to take the realty secured by the mortgage and thus avoid foreclosure proceedings which would give him no more (except as a common creditor, in case the realty does not sell for the amount of the bonds. Mr. Middleby expected to take up the manufacture and I and others felt that selling part of the property would render the remainder of considerable less value and permit him to acquire it at a very low price.

31 Further, the management of the Company for some time has not been very satisfactory to me and I think some things need investigating. For example, in the United States Court we can get some of the officers of the Company on the stand and find out whether the stock as originally subscribed was paid for or not, and I believe can secure some money for the creditors. On this account I am trying to get together enough of the creditors to elect a trustee, that is not favorable to those who do not wish to be investigated. The present receiver, the Penna. Trust Company, has for its attorney Mr. Cyrus Derr, who is also the attorney for Mr. Sternbergh, President of the Durvea Power Company. I consider this relation too close for the best interests of the creditors. I believe that the real estate, including machinery, tools, patterns and similar stuff is worth more than Mr. Middleby's offer to pay, particularly if we can find capital to carry on the work. This I have been promised but whether the parties will be on hand on the date of sale is beyond my knowledge. There are fifteen to twenty vehicles practically finished and there is considerable material well along. We were getting pretty close to a point where four rigs were being turned out and it certainly was too bad to close up the business at this time. There has been no meeting of creditors, consequently no notice. The movement I have started is the first movement to bring the creditors together. I trust your client will join us in this matter.

This Company started seven years ago with \$25,000 put in by Mr. H. M. Sternbergh, holding 51%, Capital Stock \$100,000. It made a brave fight and would at last have succeeded if I had been supported in my efforts. I did not intend nor agree to manage the Company, but the management fell gradually toward me, except at irregular intervals when Mr. S. had charge. One of these intervals was the last fall and winter. He assured me that if I would stay in the shop and crowd out the goods, he would try to see that the money for pay roll and material would be forthcoming. He assured the directors that he would rather lose \$100,000 than see the Company fail and led us to believe that he would back it to the amount of \$25,000 or more. When it went into the hands of a receiver he had advanced less than \$10,000. I have been forced to believe by the circumstances that have come to light, that he expected to shake out the other stockholders and creditors by this method and acquire the plant cheaply. I cannot reconcile the situation any other way. Of course, having no proof, I am unable to be certain that this is the case. The debts of the Company were large and always have been. Most of them, however, were not pressing. We had running accounts about \$25,000 and these were in small amounts, except in a few instances, so if any one became cross it was easily paid without danger of bringing the whole bunch down on us. The Company owes me for salary, money advanced, etc., nearly \$20,000; Mr. R. C. Aldrich, \$11,000; First National Bank, about \$10,000; deposit on orders, \$6,000 or \$7,000; money advanced by Sternbergh and Middleby \$11,500. I think this covers the indebtedness besides the bonds and running accounts mentioned. These figures are probably a little large. I

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do not have access to the books and know very little about them. This is another reason why we want the United States Court to handle the matter where daylight could be let in. I believe the property is worth to a going concern twice the appraisers' price if not more. I hope to find a buyer for it, but I could not do this in the limited time at hand and feared the present receiver would sell it before much time was given. If a fair price can be secured for the property and the stock not paid for collected upon, there will be some money for the creditors. In any event you cannot do yourself damage by helping the unsecured creditors to elect a bankruptcy trustee. This election will probably take place about the 20th of April. I will be pleased to give you any further information.

Very truly,

CED. LÉK.

CHAS. E. DURYEA.

*Copy of Exhibit "I."*

READING, PA., March 25, 1907.

DEAR SIR: This morning Roger C. Aldrich, the Excelsior Brass Works of Reading, and I, made our Application to the District Court at Philadelphia, asking to have the Duryea Power Company adjudged an Involuntary Bankrupt.

This we did for the purpose of throwing the winding up, or the selling out of the Duryea Power Company into such hands that we considered would be to the best interests of the unsecured creditors of the Company.

We felt that to put the property up for sale at this time, with short notice, and before the matter was fully advertised and known to be for sale by interests that were apt to buy the plant, would be to the detriment of the general unsecured creditors, and that the only persons to profit by such a course would be the secured creditors.

In order that we may accomplish our purpose, it will be necessary to have a Trustee selected whose views will be in accord with those that I have stated in this letter.

It is my purpose to realize as much out of this concern for the creditors, as possibly can be realized.

Enclosed you will find a blank for your Proof of Claim, also a special Power of Attorney.

I wish you would kindly make up your Proof of Claim, and also execute the special Power of Attorney authorizing either me, or Geo. W. Wagner, Attorney for petitioning creditors, to act in the selection of a Trustee in accordance with the above views.

Truly yours,

CHAS. E. DURYEA.

Use either corporation or partnership blank as suited to your case. Also execute affidavit on back of letter of attorney.

*Copy of Exhibit "J."*

READING, PA., May 6, 1907.

A creditor of the Duryea Power Company has sent to me a letter written to it by H. M. Sternbergh, President of the Duryea Power Company.

In that letter certain statements are made which I feel should be answered for fear that similar letters may have been sent to other creditors of the Duryea Power Company.

One statement is: "Mr. Duryea wishes to purchase the plant of the Duryea Power Company, and so wishing, naturally desires it to sell for as low a figure as possible. In order to assist him in procuring the plant, he wishes to have appointed as trustee someone friendly to his interests."

Fearing this may give a wrong impression to the creditors, I give herein a brief history of the appointment of the Receivership of the Duryea Power Company as it appears in the Court of Common Pleas of Berks County.

On February 15, 1907, a creditor of the Duryea Power Company, together with Robert E. Graham, a stockholder holding one share, filed a Bill in Equity alleging, among other things, that execution had been issued against the Duryea Power Company for the collection of a debt due to the execution creditor, that the Company was insolvent, also stating that it was to the best interest of the creditors to have a Receiver appointed, and asking for the appointment thereof.

This Bill was filed at 8.45 A. M. At 8.46 A. M. same date, that is, one minute after, the Answer of the Duryea Power Company, signed by Herbert M. Sternbergh, President, and attested by Robert E. Graham was filed, in which they practically acknowledged the truth of all the facts contained in the Bill, and thereupon by the agreement of the counsel of the petitioning creditor, and the counsel for the Duryea Power Company, the Pennsylvania Trust Company was at once appointed Receiver.

This action by the Company was taken during my absence  
34 from Reading, and without my knowledge or consent, although I am the second largest stockholder of the Company.

On March 14, 1907, the petition of the Pennsylvania Trust Company as Receiver was filed, asking to be allowed to complete the unfinished automobiles, and also stating in said Bill that Joseph Middleby, a creditor, had offered to take in payment for his Mortgage upon the property, the property contained in Schedules 1, 2, and 3 contained in said Bill.

If I am not mistaken a copy of that Bill or petition was sent to all of the creditors of the Duryea Power Company. By a close examination of said Bill, you will see the contents thereof.

Had the property been sold to Mr. Middleby for his claim of Twenty-eight Thousand Five Hundred Dollars (\$28,500.00), and possession delivered on April 1st, it would have very materially decreased the value of the Automobile parts and material, for the reason that then a factory would have been lacking to the Duryea Power

Company in which to use up the Automobile parts and material, and also to complete the unfinished vehicles.

You will also notice by said petition, that Mr. Sternbergh claimed, by several Assignments, the six finished automobiles that had been sent to the Pacific Coast for sale, also the Book Accounts, etc.

By scrutinizing that Bill you will see that were the Claims of the respective parties allowed, there would have been nothing left for the unsecured creditors.

Under these circumstances, at the instance especially of Roger C. Aldrich, who has a claim against the Company for Eleven Thousand Dollars (\$11,000.00), Ten Thousand Dollars (\$10,000.00) being money that he loaned the Company, and which claim is undisputed, it was considered best to throw the Duryea Power Company into Involuntary Bankruptcy so that the questions might best be decided in the Bankruptcy Courts as to these Claims of preference, etc., which were being made, and which, of course, would be to the prejudice of the unsecured creditors.

Also prior to the return of the petition for a sale, an answer was filed that it was not to the best interest to sell the property at private sale at once without proper notice having been given to persons who may desire to buy an Automobile plant.

My efforts have been not to purchase the plant cheaply, but to get purchasers who will give the highest price possible for it, and thus secure the greatest returns for the unsecured creditors also to have a Trustee appointed who may not in any way be allied to the President of the Company, or to any of the officers or stockholders of the Company, so that if any action in the future is necessary to be taken

35 in the interests of the unsecured creditors, but to the prejudice of those claiming securities, and otherwise, that thereupon the Trustee would be entirely unhampered.

If you have not yet proved your claim, and granted the Letter of Attorney to represent you at the creditor's meeting, which will be in about two weeks and your views are in accord with those that I have expressed in this letter, I wish you would send me your Letter of Attorney, together with proved Claim before said meeting is held, so that the same may be used for the purpose of electing a Trustee such as I have indicated in this letter.

Very truly yours,

CHAS. E. DURYEA,  
Per K.

*Copy of Letter Marked Exhibit "K," C. E. Y.*

READING, PA., May 6, 1907.

Mr. E. A. Fraser.

DEAR SIR: The Duryea Power Company has been adjudged Bankrupt in the United States District Court, and the creditors will shortly receive a ten days' notice of the time that a Trustee in Bankruptcy is to be appointed.

The unsecured creditors at said meeting can vote either individually or by proxy after their Proof of Claim has been filed.

A number of the creditors are claiming security upon the assets of the Company. Should said securities be allowed, it would practically eat up all the assets of the Company, and there would be nothing left for unsecured creditors.

Under these circumstance it is the consensus of opinion of a very large number of unsecured creditors, of whom Roger C. Aldrich is the largest, he having an unsecured Claim against the Company for Ten Thousand Dollars (\$10,000.00) that a Trustee should be appointed who is in no way allied with any of the officers, stockholders of the Company, or their Attorneys, so that there may be no feeling by anyone that the affairs of the Company will not be impartially wound up.

I am writing this letter because as the Purchasing Agent I feel obligated to you, and because I desire to see that you realize as much on your unsecured Claim as can possibly be done.

A large number of the creditors of this City, together with outside creditors, are taking the same view that I am expressing in this letter.

36 Mr. Geo. W. Wagner, Attorney, 526 Washington street, this city, represents a large number of these unsecured creditors, and is acting solely for their interests.

I would suggest that you send to him your Claim, properly proved in accordance with the Bankruptcy Act, together with a general Letter of Attorney, also executed, authorizing him to represent you at said meeting.

Very truly,

W. C. HOHL.

*Copy of Letters Marked Exhibit "L." C. E. Y.*

Enclosed you will find a proof of Debt, and also General Letter of Attorney in the Bankrupt estate, Duryea Power Company.

If you have not already placed your Claim for collection, I will be glad to take charge of same. I represent the largest unsecured creditor whose claim is Ten Thousand Dollars (\$10,000.00), and a large number of other unsecured creditors.

If you desire me to do so, kindly execute within Proof of Debt, and also General Letter of Attorney.

Be sure to execute both before a Notary Public at the places I have indicated by lead pencil marks.

If you have Notes for your Claim, attach to the Proof the original Notes, which will be returned to you after the creditors' meeting, which will be held on June 6th at 11 o'clock A. M.

If you do not have Notes, attach to the Proof an itemized bill of your Claim. Kindly attend to this matter at once.

Very truly yours,

GEO. W. WAGNER.



*Exhibit "L" Continued.*

READING, PA., June 7, 1907.

SIRS: The creditor's meeting in the Duryea Power Company was held yesterday. Your Claim was presented by me, and I also nominated the Berks County Trust Company as the Trustee.

On account of disputes arising with regard to the Claim of C. E. Duryea, and also with regard to the Claim of Herbert M. Sternbergh, who was president of the Company, final action was not taken on the election of a Trustee until those Claims were decided. The meeting was continued until Thursday, June 20th.

When Mr. Sternbergh was on the stand he admitted upon examination by me that whilst he had five hundred and ten shares,  
27 One Hundred Dollars per share, par, Fifty-one Thousand Dollars, he had paid into the Company for that Twenty-five Thousand Dollars, and no property.

The position of myself, together with that of a number of other Attorneys, who represent large Claims for the unsecured creditors, is that he is liable for the unpaid part of his subscription to the Capital Stock, to wit: that he is liable for the further sum of Twenty-six Thousand Dollars.

It is also on account of this question, to allow the Referee to look into it more closely, that the meeting was continued to June 20th.

We consider it very advisable to have the Berks County Trust Company as Trustee in this matter for the reason that we feel that it will be entirely free to act, and prosecute such claims as the above against any of the officers of the Company, and that it is to the best interests of the unsecured creditors to have said Company act as Trustee.

There may be some attempt made by the friends of Mr. Sternbergh to have the Power of Attorney, granted to me by you, revoked between this and June 20th so as to destroy your vote for above Trustee.

I write this to put you on your guard, and also to acquaint you with the facts as the case now stands.

I think we have made substantial progress to get something material for the unsecured creditors. Any information that you may desire at any time on this subject I will gladly give you, by your writing to me.

Very truly yours,  
(Signed)

GEO. W. WAGNER.

READING, PA., May 23, 1907.

Penn Spring Works, Baldwinsville, New York.

SIRS: Yesterday the Schedule- in the Duryea Power Company Bankruptcy matter were filed. The creditors' meeting will be held on June 6th at 11 o'clock A. M.

The Schedules show an unsecured indebtedness against the Company of \$61,645.00.

The Stock in trade is valued at \$21,750.00, tools \$1145.95, debts



due on open account \$1917.00. There may be other assets available from the fact that the Claim is made that some of the large stockholders have paid in only one-half of their capital stock, and it is the purpose of the unsecured creditors to try to realize from that matter also.

38 You have not yet sent to me your General Power of Attorney. Will you kindly have this executed by the Treasurer at once, and forwarded to me so that I may act for you in the selection of a Trustee on June 6th?

I represent a large number of unsecured creditors, of whom Mr. Aldrich alone has a claim of over Ten Thousand Dollars.

Our purpose is to elect a Trustee in the interests of the unsecured creditors.

To do this it will be necessary for me to have your General Power of Attorney.

Very truly yours,

GEO. W. WAGNER.

READING, PA., *June 8, 1907.*

Penn Spring Works, Baldwinsville, New York.

SIRS: On Thursday, June 6, was the first meeting of the creditors of the Duryea Power Company. I was sorry that I did not have your Power of Attorney so that I could vote it for the election of the Berks County Trust Company as Trustee.

I understand that you have given it to Mr. Sternbergh. I consider it to the best interests of the unsecured creditors that the Berks County Trust Company be elected as Trustee in this matter for the reason that it is our purpose to compel Mr. Sternbergh, who holds \$51,000.00 par Stock of the Company to pay for the balance of his Stock, which he has not paid.

The testimony at the meeting was that he had only paid \$25,000.00 for the \$51,000.00.

This we contend is a fraud on the creditors, and that it makes no difference what arrangement the Stockholders and the Directors *has* as to the issuance of stock, when once the Company is insolvent all unpaid subscriptions are a trust fund for the payment of the debts of the creditors of the concern.

I herewith enclose you a letter that I have written to a number of creditors, together with a clipping from one of our daily newspapers that may give you a true status of the situation, and see that it is to your interest as an unsecured creditor to cooperate with us.

I together with the Attorneys who are co-operating with me, represent at least Thirty Thousand Dollars (\$30,000.00) of unsecured Claims.

If, under this explanation, you desire to revoke the Power of Attorney that you have given to Mr. Sternbergh, I herewith enclose a Power of Attorney for that purpose.

Any further information that you may desire with regard to this matter I will be glad to give.

39 I think you will see from the enclosed that it is to your interest, having a large Claim, to co-operate with us in having the Berks County Trust Company appointed as Trustee.

Very truly yours,

GEO. W. WAGNER.

## EXHIBIT "M."

## Reading Telegram.

The Telegram's Issue for Friday, June 7, Consisted of 8,468 Copies.  
Complete News Report of the Associated Press.

First Edi.      Reading, Pa., Saturday, June 8, 1907.      First Edi.  
Price One Cent.

Says \$26,000's Due Duryea Co.  
From H. M. Sternbergh.

The election of a trustee in bankruptcy for the Duryea Automobile Company was deferred by the creditors until Thursday, June 20, at 11 a. m. Although the meeting of creditors before Referee Bertolet on Thursday was called for the specific purpose of electing a trustee, the large number of creditors who presented claims aggregating about \$110,000 will require proof of the establishment of claims.

There are two candidates named by the creditors for trustee. George W. Wagner placed in nomination the Berks County Trust Company and E. H. Deysher the Pennsylvania Trust Company. A trustee is elected by the largest number of creditors who have given proxies to the candidate and the largest aggregate of claims.

Sherman H. Hoverter, representing 25 creditors, aggregating claims of over \$3,000, and Wellington M. Bertolet, representing a claim of \$1,017.90, filed proxies with the referee.

## Mr. Sternbergh's Stock Holdings.

Herbert M. Sternbergh, who was president of the Duryea Company, was asked by George W. Wagner about his stock holdings in the concern.

"What amount of stock did you hold in the Duryea Company?"

"51 per cent., originally."

"How many shares?"

"510, par value \$100, or \$51,000."

40      "Were these all paid for?"

"\$25,000 has been paid."

"Why was the \$26,000 not paid?"

"It was."

"In what manner?"

"In services rendered by me before and after the incorporation of the company."

"When was the company incorporated?"

"April, 1900."

## Says It Contradicts Him.

Mr. Wagner sprung a surprise when he read the report made by the Duryea Company through Mr. Sternbergh and the officers to the state department at Harrisburg, on Oct. 29, 1900, in which the com-

pany reported an increase in the stock from \$1,000 to \$100,000; the return stating that the stock was issued for cash and property.

"This contradicts Mr. Sternbergh's statement," said Mr. Wagner.

"What property did you give the concern in exchange for the \$26,000 stock?" asked Mr. Wagner of Mr. Sternbergh.

"None."

"You were president of the company; do you know of any property given for stock?"

"No, sir."

"Is the report true that the stock was in exchange for cash and property?"

"I believe so."

"And not for wages?"

"No, sir."

Mr. Wagner said that Mr. Sternbergh's own testimony shows that he is indebted to the company for \$26,000 for stock issued and unpaid for. He offered in evidence a certified return made to Harrisburg, by the company, which he claimed bore out these facts.

Referee Bertolet thought this controversy was a matter of law and intimated that its proper disposition would involve a suit against Mr. Sternbergh.

Paid \$12,513 in Notes.

The latter was shown notes endorsed by him for the company.

"Was any property assigned to you as collateral security for the payment of these notes?"

"No, sir."

The notes in question were paid by Mr. Sternbergh. They aggregated \$12,513.86. Two other notes were given by the Duryea

41 Company and aggregated \$1,925. The bonded indebtedness of the concern amounts to \$28,500.

It will require some time to go over the books of the company. The latter under the receiver, the Pennsylvania Trust Company, is selling parts of stock on hand at retail prices. This was not objected to by the creditors.

*Copy of Exhibit "O," C. E. Y.*

Geo. W. Wagner, Att'y, 528 Washington St., Reading, Pa.

DEAR SIR: Enclosed we beg to hand you statement, for proof of debt, properly signed and sworn to. This is our account against the Duryea Power Co. "The general letter of attorney in fact" will be attended to in the course of a day or two.

Kindly acknowledge receipt of this, and very much oblige,

Yours very truly,

F. D. ROBINSON.

*Copy of Exhibit "N," C. E. Y.*

Geo. W. Wagner, Esq., 30 Washington St., Reading, Pa.

DEAR SIR: Can you give us any information about the Duryea Power Co., or Mr. Duryea himself? Has any action been taken by

Reading Scale and Machine Co., \$89.61.

Balance, part for materials furnished and part for work and labor done at the plant of the Duryea Power Co. \$59.82 I took for labor which I claim has a preference. I took part of the balance for labor and part for materials.

REFEREE: There being no further secured or priority claims offered for proof and allowance, the Referee next called for proofs of claims of unsecured creditors.

G. B. STEVENS, Esq.: I present the claim of Henry Connard, Reading Brass Works, \$84.07.

O. M. WOLF, Esq.: I present the claim of J. O. Glass & Co., \$22.40.

HARRY J. DUNN, Esq.: I present the claim of the Hartford Rubber Works, Hartford, Conn., \$3,478.92.

GEO. W. WAGNER, Esq.: I offer for proof and allowance the following claims with Power of Attorney in each one to me:

Whitney Mfg. Co.	19.00
W. Cramp & Sons, Shipping Engine Bldg. Co.	134.44
Medical World	81.00
Touchill Spring Co.	121.94
Ketterlinus Lithographing Mfg. Co.	165.00
Scientific American, Mon & Co.	2.00
H. J. Heek	12.63
F. S. Wertz & Co.	114.00
Textile Machine Works	251.86
Continental Cachue Co.	143.36
Ellis & Cummings	506.95
James F. Martine	1,260.35
American Cost Accounting Co.	266.60
Knoblauch Heideman Mfg. Co.	49.60
Roger C. Aldrich	11,505.87
E. S. Youse	51.65
U. S. Graphite Co.	1.24
Boston Gear Works	68.00
English & Mercer Co.	20.25
Brown Lippy Gear Co.	50.03
Bitzle Co.	26.06
Chas. H. Schlegel	50.00
Baldwin General & Mfg. Co.	170.85
B. F. Owen & Co.	273.85
Ott Mercantile Co.	77.01
45 J. O. Flatt & Co.	26.66
Sims Kent & Co.	1.00
Excelsior Brass Works	104.52
S. M. Heim	1,225.00
Charles M. Hoverter	243.53
C. F. Ham Mfg. Co.	3.87
E. H. Zacharias	6.00
Albright & Shenton	486.80
J. G. Speidle	210.42
Reading Rubber Stamp Works	43.25
Charles H. Fuller & Co.	52.12

Reuben Hoffa .....	290.71
Capital Foundry Co .....	1,190.74
Houghton & Richards .....	177.39
C. F. Hill .....	74.10
Daniel Medlam .....	52.20
Hercules Electric Co .....	227.50
Light Mfg. Fdy. Co .....	45.50
Albert S. Power .....	500.00
P. S. Malcolm .....	500.00
G. A. Hebb .....	34.72
H. H. Wilford .....	50.00
American Motor Car Mfg. Assn. ....	250.00
Standard Tool Co .....	4.94
Cascaden Vaulghan Co .....	312.32
Chantrell Tool Co .....	682.43
Field & Co. Inc. ....	392.30
James Freeman .....	35.00
Penn Spring Works .....	715.59
Charles E. Duryea .....	19,036.59
Tragle Cordage Co .....	15.29

Mr. DEYSHER: I object to the Duryea claim until it is sufficiently proven, and there are other claims in which there are two Powers of Attorney, in which cases the last of necessity would go. I have proof of claim and power of Attorney of more recent date of Tragle Cordage Company.

Claim of Charles Duryea is objected to because it simply shows a statement made up without being a matter of book account, or with the exception of a few items at the bottom, evidenced by any evidence of indebtedness.

Mr. WAGNER: I desire to state this, that as far as that proof of claim has gone, it clearly makes out a complete proof.

If the Referee thinks it is necessary, I will ask to amend that and make up a statement by a memorandum made by the claimant from the books of the company.

46 The REFEREE: I don't consider it necessary to produce the

books of account to prove a claim. All he need do is to take the account as far as he knows. From different sources he can set it out in statement form and attach the proof. The Act of the General Orders do not require that the proof of claim should be accompanied by the original books and the original entries. What is necessary to make up a legal proof of claim is a statement of the amount or amounts copied from the original entries, if there are any, and taken either from records, if any, or from memory. If the books of original entry would have to be offered in evidence in connection with each proof of claim coming, as often happens, from the remotest part of the country, it would make a claim almost impossible of proof and would make the administration of a bankrupt estate a cumbersome matter. The Act of Congress and the General Orders contemplated the utmost ease and simplicity. To require the production of original entries in the proof of each claim would, in

a case like this where there are over three hundred creditors, fill the room with ledgers and make it impossible to transact business in the manner contemplated by law. Therefore, it has been provided that an affidavit either including in its contents or accompanied by a statement of, a copy of original entries, if there are any such, shall be sufficient prima facie proof of claim. Of course if the proof offered is intended to be used for voting purposes in the election of a trustee and is so much in amount as to be controlling of that result, any objection made to the amount of the claim must be listened to and the claim must be examined, and the amount for which the claim should properly be allowed must be ascertained. Then it can be used for voting purposes. If the claim here is intended so to be used, I will first have to listen to the objections and examine the claim.

Mr. DEYSHER: If you think it necessary to object specifically, I will make the following objections.

The claim of Charles E. Duryea is objected to, first, because there is no evidence produced and no evidence appearing on the books of the company showing the delivery of property or the payment of money for the benefit of the company by the said claimant.

2. That there is no record or evidence of any character showing that any of the said items were furnished to said company, received by said company, or authorized by any one to be received for the company.

3. That the books of the company do not show any charge by said company nor credit to said Charles E. Duryea of the items contained in the claim of said Duryea.

4. That the books of the company show that the said company is indebted to the said Charles E. Duryea in the sum of about twenty-three hundred dollars (\$2,300).

The Referee is therefore moved to reduce all claims of the said Charles E. Duryea to that amount and for that purpose to take testimony of witnesses in order to fix and ascertain the correct amount of the claim.

Mr. WAGNER: To this I make the objection that in the first place they have not shown as to any specific item that our claim is invalid.

2. The mere fact that the books of the company would not show that this amount is due to us will not invalidate the claim.

REFEREE: I think it would be better to examine the claim and take the testimony of the claimant and to listen to the objections now.

CHARLES E. DURYEA, sworn.

By Mr. WAGNER:

Q. You have filed here a claim against the Duryea Power Company; you may tell us how you got to the items that you have contained here in this statement attached to this proof of claim?

A. About November, as I remember, the question of my claim came up, and there was a man going over the books at the office at that time, a Mr. Cunningham. He undertook to get from the

books a statement of how my account stood. He was advised by the Directors that because the books were in a bad shape it would be wise to start at the beginning of the books and make debit and credit entries all the way through to January 1, 1907. It was evident from that statement that he had overlooked a good many items and I undertook from my own records and from the books of the company, including the check books, and from other sources, to check up his items and also add any missing items and strike out any errors, and this claim was prepared by me in that manner.

Q. Is that correct?

A. Yes, sir.

Q. The account was first made out by Cunningham and from the books of the company?

A. Yes, sir. Further, the books of the company as regards my own account had not been properly kept for a good while back. When the company was formed, I was to receive a salary of two hundred and fifty dollars per month under a contract for special services because I had valuable patents, but I did not draw more than I needed, but some one without my knowledge had instructed Cunningham to fix things so as to make it appear in the books that my compensation had been reduced to one hundred. This accounts for the difference between my claim and the books.

48 Mr. DEYSHER: Objected to as irrelevant and immaterial.

Q. The notes that are referred to in this matter are still in your possession?

A. Yes, the notes that were submitted here.

By Mr. BERTOLET:

Q. Did you take any account of a set-off against your claim when this statement was prepared?

A. This claim shows both sides, the debits and credits.

Q. Your claim as proved shows a balance in a credit of nineteen thousand thirty-six dollars and some cents?

A. Yes, sir.

Cross-examination.

By Mr. DEYSHER:

Q. Mr. Cunningham was an expert accountant?

A. Yes, sir.

Q. He made up the account from the books in your presence?

A. I was not present.

Q. Didn't you see the account he made up?

A. Yes, sir.

Q. That was twenty-two hundred and some dollars?

A. I think it was more than that.

Q. Do you have the account?

A. I have a copy of it. I have not the original.

Q. Do you have the copy he gave you?

A. What I made from his original copy.

Q. Did you look over the account in the books?



A. I looked over my account in the books and also my own private account. My account in the books has never been for several years properly kept. It was never completed and never was kept right, so if you go by the books you cannot get a complete record?

Q. Where are the books which you kept?

A. My own records are at my house.

Q. Here is one item, March, 1900, motor car No. 1, \$250, where did you get that?

A. I brought that from Peoria, Illinois, where I had been doing a little automobile manufacturing. There were two or three motors which had been used in manufacturing, and motor No. 1 was one of the first.

Q. Was there any action taken by the company on the subject?

A. They paid me for it shortly after.

Q. Stock book, on June 21, paid by Duryea?

49 A. I had a stock book and paid for it and delivered the book to the company.

Q. And the company subsequently paid you?

A. I don't remember that. It will show there (indicating). This does not show. They entered one item but did not enter the other. I paid for the stock but they did not give me credit for it.

Q. July 2, motor bill of June 11, \$250?

A. That was motor No. 2.

Q. Do you know where it came from?

A. Peoria, Ill.

Q. Does it appear on the books of the company?

A. I found evidence there.

Q. That was taken from your own account?

A. I would not attempt to separate which items were taken from memory and which from the books of account.

Q. Either your own books or the books of the company would show that?

A. Yes, sir.

Q. November 5, Holyoke trip, \$28.35, was that money paid to you by the company?

A. My record shows it was.

Q. Dec. 8, for photos and history leaflet, \$3?

A. My record does not show it was paid for.

Q. Was that authorized by the company?

A. The photos were used and that shows that it was authorized by the company. I prepared this in December and January.

Q. April 5, delivery wagon, \$1,000?

A. I brought it with me from Peoria and Providence. The delivery wagon was used for a sample and was afterwards sold to John Graber of Jenkintown.

Q. Was that paid for?

A. I think you will find entries that that was paid for.

Q. October 31, motor, \$250?

A. I think that was the third motor I furnished.

Q. Did the company pay for that?

A. I believe so.

Q. February 26, initiation fee, twenty-five dollars?



A. I don't think I ever received that. The company belonged to the F. A. M. Automobile Association. That can be seen by my own check, but the company have had the benefit of it.

50 Q. Did you say it has or has not been paid?

A. I think it was paid.

Q. That was the company membership and not for an individual?

A. It was originally a company membership but it stood in my name.

Q. Wagon No. 1, \$1,200, where was that wagon furnished?

A. That was first sold to me at \$1,500, but if the item shows \$1,200, it is right. I bought that wagon and used it, and resold it to the company and they paid \$1,200 for it.

Q. Is wagon No. 1 there the same as vehicle No. 1 there? (indicating).

A. This was a new one. This was delivered to me in August, but the entries on the books show October 1. That is the same, yes, sir.

Meeting adjourned to 2 o'clock P. M.

Convened at 2 o'clock P. M.

At the opening of the adjourned meeting, Mr. Wagner, Attorney for Charles E. Duryea, the claimant, and Mr. Deysher, who objected to the allowance of the claim, announced that they believed it necessary to examine the books of the bankrupt in order to ascertain the amount of Duryea's claim. They agreed that this would take a long time and that the allowance of the claim should be held in abeyance until the next meeting, especially as the number of claims yet to be offered would make it impossible to elect a trustee at this meeting.

REFEREE: I will allow the examination of the Duryea claim to be suspended for the present and taken up at the next meeting. We will now proceed to the proof of additional claims.

ANDREW A. LEISER, Esq.: I offer for proof of allowance the following claims:

Howard Rockafeller, Butte, Montana, \$2,200, with interest from August 1, 1906, together with his letter of attorney to myself.

F. W. Bacorn, \$400.00; with interest from January 10, 1907, together with letter of attorney to myself.

E. H. DEYSHER, Esq.: I offer for proof and allowance the following claims with power of attorney in each one to me:

Rodney Davis .....	\$524.00
The Penna. Flexible Metallic Tubing Co.....	36.13
Boss Machine Works.....	3.00
U. S. Express Co.....	38.68
Rose Mfg. Co.....	55.16
51 C. M. Brownell.....	49.78
Buffalo Auto Body Trimming Co.....	1,540.20
Crown Battery Co.....	20.00
W. T. Hungerford Brass & Copper Co.....	172.40

R. E. Deitz & Co.....	175.37
Philadelphia Machine Screw Works.....	706.60
E. E. Stevens.....	62.15
Voorhees Rubber Mfg. Co.....	270.46
J. H. Williams & Co.....	90.51
Powell Clouds & Co.....	193.47
Merchants National Bank of Baltimore.....	103.46
International Time Recording Co.....	175.00
Hampden Planing Mill Co.....	50.52
M. J. Earl.....	3.63
Chas. Parker Co.....	1.10
F. R. Phillips Sons & Co.....	159.47
P. M. Ziegler.....	120.84
David L. Keber.....	186.58
Tragle Mfg. Co.....	115.34
Crescent Brass Mfg. Co.....	26.30
Reading Eagle Co.....	2.36
Consumers Gas Co.....	1.80
Eagle Book Store.....	12.09
Tragle Cordage Co., with power of attorney dated June 3, 1907.....	15.91
The Phila., Reading & Pottsville Tel. Co.....	3.54
E. S. Ammon.....	.75
George M. Miller.....	24.00
Miller & Van Winkle.....	19.75
Standard Electrotpe & Eng. Co.....	.50
George M. Bearrs.....	80.00
American Die & Tool Co.....	560.70
Davis Coal & Coke Co., no power of attorney.....	49.96

E. S. KREMP: I offer for proof and allowance *for* the following Claim: H. M. Sternbergh, \$14,438.86.

Mr. WAGNER: I object to the allowance of any amount of this claim above nine thousand nine hundred dollars (\$9,900) until the original notes for the balance are produced.

Mr. KREMP: We have nine thousand nine hundred dollars (\$9,900) of the notes, but some are in the hands of Attorney Bennet Nolan for collection and we cannot at this time get them.

REFEREE: I think the notes must be produced. Objection sustained.

Mr. WAGNER: Objection to the claim is made on the ground, in the first place, that the notes are not here for the purpose of substantiating that claim.

2. In the second place we would like to inquire of the claimant whether he has received any securities for the notes that have been paid.

REFEREE: The objection with respect to the absent notes is a good one and must be sustained. The request to examine the claimant on the balance of the claim is allowed.

First, however, in order to allow creditors who desire to leave a chance to do so, I will receive any additional proofs of claim not yet offered, and will also receive here nominations for a Trustee and will receive the votes of the creditors who do not wish to stay.

B. F. DETTRA, Esq.: I offer for proof and allowance the following claims; Letters of Attorney attached:

Anderson Forge Machine Co.....	\$308.00
Reading Wood Pulley Co.....	13.40
Mechanical Rubber Co.....	129.60

E. H. DEYSHER, Esq.: I offer for proof and allowance the following claims. There are no powers of attorney for these:

Halcolm Steel Co. ....	\$38.12
Joseph W. Jones.....	60.00
Goodyear Tire & Rubber Co. ....	38.27
E. N. Dickinson .....	200.00
Peter A. Frasse & Co. ....	13.55
Lewis R. Carter .....	6.16
Winfield P. Damm .....	113.00

S. H. HOVERTER, Esq.: I offer for proof and allowance the following claims with Powers of Attorney in each:

Mechanical Accountant Co. ....	\$72.74
White Metal Co. ....	99.15
Charles E. Miller .....	23.34
Stanley G. Flag & Co. ....	33.58
Phila. Stove & Iron Foundry Co. ....	33.45
Warner Instrument Co. ....	18.00
C. C. Knight & Co. ....	102.72
Horseless Age .....	413.85
Ball, Fintze & Co. ....	25.80
American Medical Association .....	18.00
A. L. Shoemaker .....	11.25
Also claim of Merchant Evans, which has been reduced to Judgment in the sum of .....	37.75
And cost of Judgment .....	3.39

53 With Power of Attorney. This is in the hands of the Receiver. In addition to that I desire to state that I also represent a preferred claim, which is in the shape of a Mechanic's Lien in favor of A. L. Roth for the sum of \$48.10.

Which is on record.

REFEREE: The following claims have been left with the Referee and I will read them off; these claims have Powers of Attorney in each:

Charles A. Schaeffer, Attorney.

George F. Lance .....	\$187.99
A. P. Witteman & Co. ....	281.98
Trade Adv. & Pub. Co. ....	319.40
Ansonia Brass & Copper Co. ....	155.52

Power of Attorney to Snyder & Zieber, Esqrs.

W. H. Pickering .....	\$200.00
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These claims have no Power of Attorney:

Brown & Wales .....	\$77.11
Robert McLane .....	51.56
Flood & Conklin Co. ....	611.25
William J. Kruger, Receiver .....	61.30
Robert De Hart .....	127.69
Niagara Machine & Tool Works .....	70.65
Orr & Sembower .....	22.60

Also Power of Attorney to Wellington M. Bertolet, Esq.:

Sharman & Haubner .....	\$1017.90
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REFEREE: I will now entertain nominations for Trustee.

E. H. DEYSHER, Esq.: I nominate The Pennsylvania Trust Company.

GEORGE W. WAGNER, Esq.: I nominate The Berks County Trust Company.

REFEREE: If there are no further nominations we will proceed to receive the votes of creditors who desire to leave the meeting.

Said creditors then signed the blank appointments of trustee in favor of The Pennsylvania Trust Company and The Berks County Trust Company, respectively, as their choice prompted them.

(See appointment of Trustee by creditors on file.)

REFEREE: The claim of H. M. Sternbergh and the objection thereto will now be taken up and the claim examined.

Mr. KREMP: I offer in evidence the following notes:

Note for \$2000, dated Reading, Pa., Feb. 4, 1907.

Note for \$1400, dated August 23, 1906.

Note for \$1500, dated Reading, Pa., August 25, 1906.

54 Note for \$2500, dated Reading, Pa., Jan. 16, 1907.

Note for \$2500, dated Reading, Pa., December 24, 1906.

Making a total of Nine Thousand Nine Hundred Dollars (\$9900).

Mr. KREMP: I want to call J. Bennett Nolan to testify as to the remaining notes.

J. BENNETT NOLAN, Sworn.

By Mr. KREMP:

Q. Do you have in your possession any notes belonging to Mr. H. M. Sternbergh?

A. Yes, I have in my possession two notes belonging to him.

Q. What are they?

A. Note of W. H. Dieffenderfer to the Duryea Power Company, dated January 7, 1907, for Six Hundred and Fifty Dollars (\$650), protested at maturity.

Q. What is the other note?

A. The other is a note from John Walz to The Duryea Power Company, dated January 6, 1907, for \$1275, payable two months after date and protested at maturity. The John Walz note was endorsed by the Duryea Power Company, H. M. Sternbergh, President, H. M. Sternbergh and Charles E. Duryea.

Q. Are there any other notes in your possession?

A. No.

Q. Were any other notes given to you for collection?

A. Yes, four notes.

Q. Are these two of them?

A. Yes.

Q. What are the amounts of the other two?

Mr. WAGNER: We object and ask for the production of the notes.

Q. Where are the notes?

A. I forwarded them to the Attorneys in the different cities for collection.

Mr. KREMP: I think we can get them.

By Mr. BERTOLET:

Q. Were these notes given in payment of goods purchased?

A. He bought them from the First National Bank.

By Mr. KREMP:

Q. What are the amounts of the other two notes?

A. One for \$1063.86. This was sent to Roscoe M. Dexter, Attorney, 225 Main street, Pawtucket, R. I. The other was for  
55 \$1550 and was sent to Henry L. Bogert, Attorney-at-Law, No. 99 Nassau street, N. Y.

Cross-examination.

By Mr. WAGNER:

Q. Were the notes paid?

A. Yes, sir.

Q. Do you know whether they have been paid by H. M. Sternbergh?

A. Yes, sir.

Q. The notes have not been paid to you since they have been put in your hands for collection?

A. No.

Q. The debt is still owing?

A. Yes, sir.

REFEREE: The Sternbergh claim will be allowed to the extent of the notes that are here and offered in evidence, unless further objections to be heard should debar it.

H. M. STERNBERGH, called by E. S. Kremp, being sworn, testifies as follows:

By Mr. WAGNER:

Q. Here is a note signed by you and Charles E. Duryea, dated Feb. 4, 1907, to the Duryea Power Company; is it not a fact that when you signed these notes that you received some security from the Duryea Power Company?

A. No, sir.

Q. Is it not a fact that these are notes given to the Duryea Power

Company on account of the indebtedness to you by the Duryea Power Company?

A. No, sir.

Q. What amount of stock do you have in the Duryea Power Company?

Mr. KREMP: Objected to as irrelevant and immaterial.

Q. What was the amount of your stock that you have in the Duryea Power Company?

Mr. KEMP: What is the purpose.

Mr. WAGNER: For the purpose of contradicting him in this matter, to show his liability with the Company on unpaid stock.

I want to find out how much stock he has, show how much  
56 he has paid and see whether this has not been given for the difference, or in any event, whether he is indebted to the company.

A. I am not indebted to the company.

Q. The question is how much stock do you have?

REFEREE: I think they have a right to show whether you owe anything on the stock.

Q. How much did you subscribe for?

A. Fifty-one per cent (51%) of the stock.

Q. How many shares?

A. Five Hundred and Ten shares (510).

Q. And the par value was how much?

A. One hundred Dollars (\$100) per share.

Q. That would be Fifty-one Thousand Dollars?

A. Yes, sir.

Q. How much did you pay?

A. Twenty-five Thousand Dollars.

Q. Twenty-six Thousand Dollars you have not paid?

A. No, sir.

Q. Did you give any property for the Twenty-six Thousand Dollars?

A. No, sir, services.

Q. When did you give these services?

A. Before and after the incorporation of the company.

Q. To what extent before the incorporation of the company?

A. I cannot say.

Q. When was the company incorporated?

A. In April, 1900.

Q. When was the capital stock increased from One Thousand to One Hundred Thousand Dollars?

A. Don't remember.

Q. Was it April 20, 1900?

A. I don't remember.

Q. Were you not an official of the Company?

A. Yes, sir.

Q. Were you not at the meeting of the Company at the time the stock was increased?

A. I was.

Q. Didn't you sign?

Mr. KREMP: I object. What is the purpose?

Mr. WAGNER: If he has given services for the balance of  
57 Twenty-six Thousand Dollars, I ask when he gave the services. He said before and after the incorporation. The fact is that on October 29, 1900, they made a report to the State Department at Harrisburg that they had issued an increase of stock from One Thousand to One Hundred Thousand Dollars, the said additional stock being issued for cash and property. I want to see what services they were and if he contradicts that report.

A. I have not contradicted that report.

Q. What property did you put in when this report was made by you as President of this Company that it was increased from one thousand to one hundred thousand dollars?

A. That property may have been put in by some one else.

Q. What property did you put in?

A. I didn't say I put any in.

Q. What property was put in?

A. I don't recall.

Q. You were President of the Company?

A. Yes, sir.

Q. And connected with it all along?

A. No, sir.

Q. From the time it was incorporated?

A. Not very actively, however.

Q. When this report was made to Harrisburg, you had received your Fifty-one Thousand Dollars of shares, had you not?

A. Of what date?

Q. October 29, 1900?

A. I believe so.

Q. In that report it says the stock was issued for cash and property?

A. If that is the report I think it is correct.

A. Then the stock was not issued for wages to become due?

A. No, sir.

Mr. WAGNER: We object to the allowance of these claims on the further ground that the claimant's own evidence shows that he is indebted to the company to the extent of the Twenty-six Thousand Dollars for stock issued to him, and these are notes given by him to the Duryea Power Company, and I offer in evidence the certified report from Harrisburg; the certified copy of the resolutions and proceedings of the members of the Duryea Power Company, on April 29, 1900, relating to the increase of the capital stock of the Company from One Thousand Dollars to One Hundred Thousand Dollars, and also their return to the department at Harrisburg,  
58 that is, the return of H. M. Sternbergh, President, that the capital stock of said Company has been increased from One Thousand to One Hundred Thousand Dollars, said additional stock being issued for cash or property.

(Report Marked Exhibit "A" C. E. Y.)

Mr. KREMP: We object to the admission of this report. The books, and resolutions of the corporation are the best evidence.

H. M. STERNBERGH recalled.

By Mr. KREMP:

Q. Do you recognize these notes? (Showing witness.)

A. These are accommodation notes made by myself and Mr. Duryea, payable to the Duryea Power Company, discounted at the First National Bank of Reading.

Q. What became of the notes when they were due?

A. They were protested and paid by me.

Q. That is the transaction that these notes represent?

A. Yes, sir.

Q. Who got the money?

A. The Duryea Power Company.

Cross-examination.

By Mr. WAGNER:

Q. Were any vehicles assigned to you as collateral security?

A. No, sir.

Q. Any property assigned to you as security for these notes?

A. No, sir.

Q. Was any other property whatever of the Duryea Power Company assigned to you as collateral security for these notes?

A. No, sir.

Mr. KREMP: The original notes offered in evidence are withdrawn and copies substituted.

REFEREE: I would prefer to hold the claim of H. M. Sternbergh and the objections as entered on the record, under advisement. If, as it appears, the election of a Trustee cannot be accomplished to-day, such a course will be preferable to me as I should like to inform myself more carefully of the law on the subject. If, however, creditors and counsel desire to proceed with the election of the Trustee in which this claim is to be used for voting purposes, I will make a ruling at once.

59 Mr. WAGNER: I agree to allow the election of a Trustee to go over to the next meeting.

Mr. DEYSHER: I also agree to that.

REFEREE: If there is no further business to-day, the meeting may adjourn.

I will adjourn this meeting to June 20th, at 11 o'clock A. M.

The above is a report of the meeting of creditors, and adjournment thereof held in the case of the Duryea Power Company, Bankrupt, on June 6, 1907.

Witness my hand

SAMUEL E. BERTOLET,  
*Referee in Bankruptcy.*



Endorsed: In the District Court of the United States, for the Eastern District of Pennsylvania. In the matter of the Duryea Power Co., Bankrupt. No. 2768. Notes of Proceedings of first meeting of creditors, etc. Testimony of witnesses. June 6, 1907. Filed 11 A. M., June 20, 1907. Samuel E. Bertolet, Referee in Bankruptcy.

Filed July 2, 1907.

In the District Court of the United States for the Eastern District of Pennsylvania.

No. 2768. In Bankruptcy.

In the Matter of THE DURYEA POWER COMPANY, Bankrupt.

Notes of proceedings of adjourned first meeting of creditors in the above case, held before me on June 20, 1907, at 11 o'clock A. M.; also notes of testimony taken at said meeting.

Additional appearances: William Riek, Esq., for a Creditor.

READING, PA., THURSDAY, June 20—

At 11 o'clock a. m.

REFeree: The meeting will come to order. The first business will be the proof of additional claims, if any.

E. H. DEYSHER, Esq.: I offer proofs of claim with Powers of Attorney for the following:

	Adams Express Company.....	\$129.75
60	The Reading Automobile Co.....	63.15
	Atlantic Refining Co.....	70.65
	Royal Equipment Co.....	11.60
	Fred D. Mick.....	65.00

E. S. KREMP, Esq.: I offer proofs of claim and Power of Attorney for the following:

Finnius Jones & Co.....	\$65.13
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Mr. WAGNER: I object to the Power of Attorney in that case. My Power of Attorney is dated June 18th.

Mr. KREMP: This is the first day of May, 1907.

Mr. KREMP: I also offer:

The Penn Spring Works.....	\$715.59
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With power of attorney and proof of claim attached.

Also proofs of claim and Powers of Attorney for the following:

T. T. Southwick.....	\$125.34
Eugene Bidzken Co.....	2.40
Class Journal Co.....	21.00
Orswell Igniter Co.....	116.00
Pantasote Co.....	66.00
Ditzler Color Co.....	26.06

Mr. WAGNER: Ditzler Color Co. claim has been filed.

Mr. KREMP: Date of Power of Attorney of that is May 6, 1907. Sworn to June 13. I also offer the following with Powers of Attorney:

Union Twist Drill Co.....	\$7.25
Shoen & Ketterman.....	111.10

Power of Attorney of Henry Connard. I will get the amount later on.

REFEREE: That claim is proven here that of Henry Connard.

Mr. WAGNER: We will object to that.

Mr. KREMP: I am not proving the claim. I am entering the Power of Attorney.

In the H. M. Sternbergh claim, Mr. Nolan was on the stand at the last hearing and testified he had two notes for collection. They are now here. I offer the original in evidence and wish to withdraw them and substitute copies of all the notes instead.

Notes \$1063.86, C. O. Terwilliger.

Notes of \$1550.00 of Henry Dickinson. That completes Mr. Sternbergh's claim.

I now hand you all the copies of the notes.

61 GEORGE W. WAGNER, Esq.: I offer the following proofs of claim with Powers of Attorney:

Finnius Jones & Co.....	\$65.13
Wayne Kratzer.....	319.62

Mr. KREMP: I object to the last mentioned claim. It has been paid in full.

Mr. WAGNER: Also the following:

American Motor League.....	\$12.00
W. L. Perrin.....	9.00
Atkin Steel and Malleable Iron Works.....	209.12
W. H. Lemont.....	500.00
J. M. Reifsnyder.....	14.52
Greth Machine Works.....	32.45
Chas. T. Heckler.....	2.03
H. W. Crooks.....	40.24
Morse Chain Co.....	97.09
Kline & Co.....	142.79
A. J. Spaulding & Co.....	34.50
M. Moyer & Son.....	7.77

Mr. KREMP: I object to that claim of Spaulding & Son as paid in full. I also think Greth claim was offered.

Mr. WAGNER: If the Court please, in the Sternbergh claim, I will file these written exceptions.

Mr. KREMP: I have another claim with Power of Attorney attached:

C. L. Foul.....	\$4.04
Industrial Foundry Co.....	5.52

WILLIAM RICK, Esq.: I offer the following claim with Power of Attorney for same:

Adolph C. Franklin..... \$1400.00

At the same time there is a claim made for Automobile No. 328 in Bill of Equity. I have Power of Attorney for same.

Mr. KREMP: I wish to offer the following Powers of Attorney:

Chas. A. Strellinger Co.  
Habbis & Bro.  
Fidelity & Casualty Co.  
American Cost Accounting Co.  
Sherman Williams Co.  
Damascus Bronze Co.  
Beter Mfgr. Co.  
William H. Miller.  
H. G. Shepard & Sons.  
Dr. H. Morrison.  
English & Mercer Co.  
Skinner Chuck Co.  
John C. Meyer & Co.  
Western Tool Mfgr. Co.  
Leroy Taylor.  
P. Reilly & Son.  
Goodyear Tire & Rubber Co.

62 REFEE: There has been a proof of claim in the Goodyear Tire & Rubber Co.

Mr. KREMP: This is a Power of Attorney to H. M. Sternbergh. I also offer the following Powers of Attorney:

Carbondale Chemical Co.  
Penna. Flexible Metallic Tubing Co.  
Rose Mfg. Co.  
Talcolm Steel Co.  
Plendennon Bros.  
Standard Varnish Works.  
Motor World Publishing Co.  
Hyntz Electric Co.  
C. R. Glansy.  
Fairfield Aluminum Foundry Co.  
North American Expert Co.  
Mon & Co.

Mr. WAGNER: I have Mon & Co.

Mr. KREMP: What is the date?

Mr. WAGNER: I cannot tell the date. I think it goes under the name of the Scientific American.

Mr. KREMP: I also offer the following:

Joseph N. Smith & Co.  
Light Mfg. Co.  
Sheppard Knabb & Co.  
C. T. Hand Mfgr. Co.  
Watson A. Brown.

Mr. WAGNER: I have C. T. Hand & Co. It has been filed with Power of Attorney.

Mr. KREMP: I also offer the following powers of attorney.

Valentine Co.  
Ellis & Cummings.

REFEREE: Ellis & Cummings has been proved. What is the date of the Power of Attorney?

63 Mr. KREMP: Power of Attorney dated May 23.

Mr. WAGNER: Ellis & Cummings, power of Attorney dated June 6th. Bitzler Color Co., dated 6th day of May. That is subsequent to the one I have.

Mr. KREMP: Power of Attorney of C. T. Hand Mfr. Co., dated May 3.

Mr. WAGNER: Mine is March 1st. Power of Attorney Mon & Co., April 13th.

Mr. KREMP: Mine is the 1st day of May.

Mr. WAGNER: I ask again for the admission of J. G. Spalding & Co.

Mr. KREMP: We will have to get that letter by the noon hour.

Mr. WAGNER: I offer the following Powers of Attorney:

Field and Stream Publishing Co.  
Beckwick Chandler Co.

Power of Attorney and Proof of claim of James Freeman...	\$35.00
Finnius Jones & Co., Power of Attorney dated June 18, 1907 .....	65.13
Wayne Kratzer.....	319.62

Mr. KREMP: Kratzer claim is paid in full.

Mr. WAGNER: Here is the affidavit and regular proof. Affidavit of June 19th, received by special delivery last evening.

Mr. KREMP: I object on the ground that it is paid. The books of the company show that he is paid. If he has made the affidavit yesterday, there is something peculiar about it.

I file these additional powers of attorney:

C. T. Hand Mfr. Co.  
Mon & Co.  
Goodyear Tire & Rubber Co.

REFEREE: The following claim has been left with me:

Charles H. Fisher, Power of Attorney to C. H. Schaeffer...	\$8.50
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Mr. KREMP: I offer the following claim:

Joseph W. Jones.....	\$60.00
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Power of Attorney to H. M. Sternbergh.

REFEREE: I also have the following claims:

Flood Conklin & Co., Power of Attorney to Randolph Stauffer.

Dives, Pomeroy & Stewart, Power of Attorney dated June 18, 1907.

Mr. KREMP: I also offer the following Powers of Attorney to H. M. Sternbergh:

Tragle Cordage Co., dated June 14.

Geo. W. Miller, June 15.

64 REFEREE: Miller claim filed last time, Power of Attorney to Mr. Deysher.

Mr. KREMP: I will file the Powers of Attorney in the Tragle Cordage Co. and George W. Miller matter.

Adjourned First Meeting, June 20, 1907, to 2 o'clock, P. M.

Convened June 20, 1907. At 2 o'clock P. M.

Additional Appearances: Cyrus G. Derr, Esq., for H. M. Sternbergh.

Mr. DERR: I would like to examine Mr. Hiester relative to objections made to the claim of H. M. Sternbergh.

ISAAC HIESTER, Esq., sworn.

Mr. DERR: As I understand Mr. Kremp presented a claim of \$14,000 in behalf of H. M. Sternbergh.

Mr. Sternbergh was put on the stand and asked some questions. The objection was that Mr. Sternbergh owed the Company on the stock subscribed the sum of Twenty-six Thousand Dollars, that is, he had subscribed for Fifty-one Thousand Dollars of stock and had paid only Twenty-five Thousand Dollars for it, and Mr. Heister drew up the papers.

By Mr. DERR:

Q. You are a member of the Bar?

A. Yes, sir.

Q. Did you have anything to do with the antecedent arrangements for the incorporation of the Duryea Power Company?

A. I was employed by Mr. Sternbergh, Mr. Duryea, Mr. Millholland and Mr. Crowther.

Q. There was a preliminary agreement between the parties?

A. When they came to see me they said they wanted to have an agreement drawn up——

Mr. WAGNER: I object to stating the agreement unless the agreement is produced.

Mr. DERR: The agreement will be produced.

Mr. WAGNER: We desire to have the agreement.

65 Mr. DERR: I would like to have the witness state all the circumstances antecedent to the agreement. For the purpose of showing that there was no stock subscribed for by Mr. Sternbergh, nor anything in the nature of a stock subscription, and that Mr. Sternbergh obtained his stock just as Mr. Duryea did by an agreement with the company under which the Company agreed to give him the stock for certain things, all of which the Company got; and for the purpose of showing that there is no liability on the part of Mr. Sternbergh; and for the purpose of rebutting and counteracting the influence of the assertions made by

Counsel at the other meeting, which were utterly incorrect, that Mr. Sternbergh had subscribed for Fifty-one Thousand Dollars of stock and paid only Twenty-five thousand Dollars for it, &c. Generally for the purpose of showing that there is no defence to this claim of Mr. Sternbergh's, meaning the claim for Fourteen Thousand Dollars offered to be voted by him.

Mr. LEISER: I object to the evidence for the purpose offered. The offer itself shows that a preliminary agreement was embodied in this agreement. It is incompetent for the purpose of establishing non-liability upon a subscription for stock in that it contradicts the certificate made by Mr. Sternbergh with the other officials of the Company to the State Department at Harrisburg upon which the capital stock was increased.

It attempts to contradict with oral testimony of the witness relative to preliminary proceedings with relation to a corporate matter of action, the statement made to the State Department by the officials of the Company and the stock having actually been issued, and the books of the Company showing such issue, all of which are directly in accord with the testimony of Mr. Sternbergh in this proceeding.

Therefore it is incompetent, irrelevant and immaterial, and is in no case binding upon the creditors of a corporation. Any arrangements between the promoters having nothing to do with the order of the defence by the creditors of a corporation based upon the final action of a corporation in the issue of this stock. Further it is incompetent for Counsel for Mr. Sternbergh to introduce a witness in his own behalf to contradict himself.

Mr. DERR: What creditors do you represent?

Mr. LEISER: I represent F. W. Bacorn, a creditor, and Howard Rockefeller, a creditor.

Mr. WAGNER: On the part of the creditors I represent I would join in this objection.

Mr. DERR: Which creditors do you represent?

Mr. WAGNER: I represent Robert C. Aldrich, the Excelsior Brass Works and at least fifty other creditors.

Mr. DERR: Do you represent Chas. E. Duryea, Mr. Wagner, and is he one of the creditors whom you represent?

66 Mr. WAGNER: I represent him and he is one of the creditors.

Mr. DERR: If the Court please, if you will state in the first place which of that testimony is relevant, if any, I will be very glad to cover that part.

REFEREE: I don't think the testimony referring to an agreement between the stockholders, subscribers and officers of an insolvent company can be admitted to protect such subscribers from the creditors of an insolvent corporation. It does not matter what agreement was entered into between the corporation and the subscribers to stock or between the individuals composing the corporation, with respect to how much or how little should be accepted in full payment of stock issued when a corporation has become bankrupt. Bankruptcy having intervened, the rights of creditors also intervene, and testimony tending to show that stock presumably subscribed for was not to be

paid for in full, is immaterial when a set-off is being proven on the part of innocent creditors in the nature of an unpaid subscription, against a claim offered for proof by a prima facie subscriber and a holder of stock.

MR. DERR: Will you tell us where it appears that Mr. Sternbergh is a subscriber.

REFEREE: I believe he testified in a former hearing that he subscribed for 510 shares, on page 18, of Notes of Testimony taken at the last meeting of creditors.

MR. DERR: We will call H. M. Sternbergh.

H. M. STERNBERGH, recalled.

By MR. DERR:

Q. I want to call your attention to the fact that you were called as a witness at the former hearing, and being asked "How much stock did you subscribe for?" you answered "Fifty-one per cent. of the stock." "How many shares?" "Five Hundred and ten shares." What do you mean by that?

MR. WAGNER: I object for this reason, that he cannot contradict his own testimony. He cannot contradict the stock book which shows an issuance of 510 shares, par value of \$100, to him, he having been President of the Company at the time of the issuance of stock of the company. The fact that the stock was issued is binding upon him as a subscriber.

MR. DERR: The witness having been called by an enemy when his Counsel, that is to say, Mr. Kremp, who was here and presented his claim not being his real Counsel but acting as assistant to his Counsel, and having been asked a leading question in which the  
67 word "subscribe" is contained, and having been misled into an admission for an answer that he had subscribed for fifty-one per cent of this stock, it is proposed now that his Counsel is present to ask him what he meant and what he understood that word "subscribe" to mean and to state the real facts.

MR. WAGNER: To that we propose the same objection, that it is incompetent for him to deny his subscription of 510 shares, as is shown by the stock book of the company.

MR. LEISER: I offer the further objection that the statement made by Counsel in this matter is not in accordance with the record. Mr. Sternbergh was called by his Counsel, Mr. Kremp, who presented his claim and was cross examined by Counsel for creditors. It was not a leading question but a question on cross-examination by creditors.

REFEREE: He cannot contradict the statement but he can explain.

MR. DERR: Mr. Sternbergh, having in answer to a leading question put by the opposing Counsel, "How much did you subscribe for," said "Fifty-one per cent. of the stock;" it is proposed to show by him that he did not subscribe for that stock, that he misunderstood the word "subscribe," that he did not understand it until advised by Counsel-at-law that there was a difference between subscribing for stock and getting it as he did; and it is now proposed to show

what he meant and to show the facts, and to show furthermore that he purchased the stock under a written agreement, that he paid to the company all he agreed to pay in that written agreement, and to show upon this condition of facts that he cannot give anything more for his stock beyond what he agreed to give in his contract to purchase.

Mr. LEISER: To which I object that the evidence is incompetent, an examination of the witness not having been made in the manner detailed in the offer; the record showing during the examination of Mr. Sternbergh a certificate made by him as President of the Duryea Power Company to the Secretary of the Commonwealth in the matter of the increase of the capital stock from One Thousand to One Hundred Thousand Dollars, and that such stock had been issued, this certificate having been made under date of October 29, 1900; and the attention of the witness having been called thereto, he further stated, on page 19 of the record, that he did not contradict the report, and practically stated that the contents of this report were in accordance with the facts and the records of the Company, that he was President of the Company up to the time of the receivership in this case. Mr. Sternbergh showing that the very first issue of stock was 510 shares by certificate No. 1, issued to H. M. Sternbergh, dated October 27, 1900, and the original shown on the stub of the stock certificate, acknowledgment of the receipt is as follows: Received certificate No. 1 for 510 shares this 27th day of October, 1900.

68 Signed, H. M. Sternbergh. This shows that the facts set out in the offer are not in accordance with the record. There was no misconception, and it is not competent for the witness now to explain away any admission made at that time, no words having been put into his mouth.

Mr. WAGNER: I desire to offer in evidence Stock Certificate.

Mr. DERR: This is original testimony. You cannot offer it in evidence.

REFEREE: I don't think you can offer that certificate. I would like to hear the facts in this case. I think it is important that I should know under what circumstances the claimant became possessed of this stock. It is necessary to know all the facts in determining whether the claimant has any claim for Fourteen Thousand Dollars, or the question would come up later any way. I don't see any reason why we should not go into it fully. In all this testimony that is being introduced here, I think we ought to know all the circumstances.

Mr. DEYSHER: I want to suggest that an objection protects everybody in interest. It is evident that on a claim of Fourteen Thousand Dollars that is objected to, the matter is not going to rest here. If an objection is going to be taken up and if taken before the Court on appeal, it would be better to have the testimony on record and everybody who is interested in this matter is anxious to see this estate closed.

REFEREE: The objections of Mr. Wagner and Mr. Leiser may be entered. The Referee desires to hear the facts in connection with Sternbergh's acquisition of his stock, and the questions to be asked him are not to be asked to contradict his own statement but in order



to inform us all of the facts and circumstances attending the acquisition of the stock. In cross-examination, Counsel for objectors to this claim cannot introduce anything not testified to originally.

Mr. DERR: We agree to the questions.

By Mr. DERR:

Q. Mr. Sternbergh, you were asked at the other hearing how much stock you subscribed for, and you answered, "Fifty-one per cent. of the stock, 510 shares," tell us what you meant by that?

Mr. LEISER: We object to the use of the word- what he meant.

Q. What did you understand by the word subscribed?

A. The legal meaning of the word subscribe was not familiar to me. I understood and understand it at that previous hearing to be made to me to find out how many shares of the corporation stock I held. That was the only meaning I took from it.

Q. And the fact is you did hold and do hold 510 shares of the stock of the company?

A. I did originally.

69 Q. Do you hold it now?

A. I am not quite certain. It is close to that. It might not be quite that amount.

Q. Who was the Attorney who effected that organization of the Company?

A. Mr. Isaac Hiester.

Q. Who were the other parties to the organization?

A. Myself, Charles E. Duryea, Henry Millholland and Henry Crowther.

Q. Just look at that paper (indicating). Tell us whether that is the original agreement between the parties?

A. This is the original agreement between the four parties mentioned, dated February 13, 1900.

Q. Who drew this agreement? Did Mr. Hiester draw it?

A. I think Mr. Hiester drew it.

Q. That agreement is dated February 13 and provides that a corporation shall be organized. At that time the Duryea Power Co. had not yet been incorporated?

A. No, sir.

Q. It was incorporated pursuant to that agreement?

A. Yes, sir.

Q. How many shares of stock were there of the company originally, that is, what was the original amount of capital incorporated.

A. One Thousand Dollars.

Q. How many shares did you subscribe for?

A. I don't remember accurately.

Q. Par value \$100, was it?

A. I think so and I think I had four shares.

Q. After the incorporation of the company you acquired enough additional shares to make up your holdings of 510 shares?

A. Yes, sir.

Q. Look at that paper (handing paper). What is that?

A. This is an agreement dated April 20, 1900, between myself and the Duryea Power Company.

Q. Is that the agreement in which you acquired that additional stock?

A. Yes, sir.

Q. Who drew that agreement?

A. Mr. Isaac Hiester.

Q. Who was present when you conferred with Mr. Hiester about this matter?

70 A. Generally Mr. Duryea, Mr. Millholland and myself. sometimes Mr. Crowther.

Q. Did you state all the facts to Mr. Hiester?

A. In reference to what?

Mr. LEISER: I object to how they acquired the stock.

Mr. DERR: I suggest that the acquired stock was paid for and it would make a great difference how he paid it.

Mr. LEISER: If the Court please, the stock that was acquired by the witness upon the stand is the stock that he has certified to upon the increase of the issue of capital stock that was made according to his testimony, and was made in pursuance of that increase of stock. What arrangement between the promoters or others who subscribed to that stock was made is immaterial so far as creditors are concerned, for they have no interest in that, but the pregnant matter is whether or not the corporation received full value for the stock that was issued and returned to the State Department as fully paid for in cash or property, and we submit that the examination is irrelevant and immaterial and the testimony incompetent.

REFEREE: I should like to know anything contained in this agreement showing how the holders of stock in this company acquired their stock.

Mr. DERR: I want to state a proposition. The rights of the creditors do not rise beyond the rights of the corporation. If the corporation could not set up a claim against Mr. Sternbergh for unpaid stock, the creditors cannot either. Does the Referee agree with me on that?

REFEREE: I don't think I can entirely agree with that proposition.

Mr. DERR: The creditors are entitled to only what the corporation has and to what the corporation is entitled. If the corporation is not entitled to recover money for this stock from Mr. Sternbergh, the creditors cannot. They cannot rise above their source.

Cross-examination.

By Mr. WAGNER:

Q. Mr. Sternbergh, in your former examination you referred to the fact that 510 shares had been issued to you of the stock of the Duryea Power Company, did you not?

A. Yes, sir.

Q. Is that the stock that was issued to you? (Indicating.)

A. Yes, sir.

Q. That is certificate No. 1?

A. Yes, sir.

71 Q. Dated October 27, 1900, and on the stub it shows the original issue, and that is your signature acknowledging the receipt?

A. Yes, sir.

Q. When this company was organized, were you an officer of the company?

A. Yes, sir.

Q. Were you a director?

A. Yes, sir.

Q. Have you continued as a director from the time of the organization of the company up to the present time?

A. Yes, sir.

Q. You were President?

A. I was.

Q. Were you President at the time the company was organized and during the whole time to the present time?

A. Yes, sir.

Mr. WAGNER: I offer in evidence this certificate of stock.

Mr. DERR: You cannot offer it in evidence during the cross-examination of your adversary's witness.

I now offer in evidence the agreement identified by the witness, dated February 13, 1900, between Herbert M. Sternbergh, Charles E. Duryea, Henry Millholland and Henry Crowther, agreeing among other things for the organization of a corporation called the Duryea Power Company, with a paid up capital of one hundred thousand dollars, divided into one thousand shares with a par value of one hundred dollars each, of which H. M. Sternbergh was to receive 510 shares, Charles E. Duryea, 300; Henry Millholland, 95 shares and Henry Crowther, 95. Providing furthermore that upon the incorporation of the company the full consideration of said issue of stock to them said H. M. Sternbergh shall contribute \$10,000 cash, and within sixty days thereafter \$15,000 additional, and the said Sternbergh, Millholland and Crowther shall contribute to the said corporation the entire and absolute ownership of all patents pertaining to the manufacture and use of automobiles, motors, etc., and all inventions as made by either of them or which either of them shall hereafter make, and provided also that Charles E. Duryea, in consideration of the issue of stock to him and of the sum of \$10,000 to be paid, shall contribute to said corporation licenses to use, all patents and inventions now and hereafter controlled by him, or by the Duryea Manufacturing Co. of Peoria, Ill., pertaining to the manufacture and use of motors, &c., licenses to use all patents and inventions of the description aforesaid, at present owned by the said

72 Duryea Manufacturing Co. which he shall hereafter make and acquire, and all patents granted, &c. Agreement marked Exhibit "B." C. E. Y., the following being a full copy of the agreement:

"This agreement, made the thirteenth day of February, A. D. one thousand nine hundred, between Herbert M. Sternbergh, Charles E. Duryea, Henry Millholland and Henry Crowther, witnesseth:

The said parties in consideration of the mutual covenants hereafter set forth, agree to organize a corporation forthwith under the Laws of Pennsylvania for the manufacture and sale of automobiles, motors and propellers, to be called Duryea Power Company, with a paid up capital of one hundred thousand (100,000) dollars divided into one thousand (1,000) shares of one hundred (100) dollars each, whereof Herbert M. Sternbergh shall receive five hundred and ten (510) shares; said Charles E. Duryea, three hundred (300) shares; said Henry Millholland, ninety-five (95) shares and said Henry Crowther, ninety-five (95) shares.

Upon the incorporation of said company in full consideration of said issue of stock to them said Herbert M. Sternbergh shall contribute ten thousand (10,000) dollars cash, and within sixty (60) days thereafter fifteen thousand (15,000) dollars cash additional; and said Herbert M. Sternbergh, Henry Millholland and Henry Crowther shall contribute to said corporation the entire and absolute ownership of all patents pertaining to the manufacture or use of automobiles, motors and propellers or parts of either heretofore granted to or now or hereafter controlled by either of them, and all inventions of the description aforesaid heretofore made by either of them or which either of them shall hereafter make, and all patents which may be granted therefor; said Charles E. Duryea, in consideration of the issue of stock to him and the sum of ten thousand (10,000) dollars to be paid as hereafter provided shall contribute to said corporation, licenses to use all patents and inventions now or hereafter controlled by him, or by the Duryea Manufacturing Company of Peoria, Illinois, pertaining to the manufacture or use of motors, propellers and light automobiles (by which is understood, pleasure carriages designed to carry six persons or less, and grocers' and butchers' or similar weight delivery wagons) or parts of either, and licenses to use all patents and inventions of the description aforesaid at present owned by him or by said Duryea Manufacturing Company, or which he or the said Duryea Manufacturing Company shall hereafter make or acquire, and all patents which may be granted therefor, and shall not suffer any other person, firm or corporation east of the meridian of the eastern boundary line of the State of Ohio, by license, transfer of patents or otherwise, to use any such present or future patents or inventions for the purpose of manufacturing light automobiles; it being further agreed that if said corporation at the end of twenty-one months from its incorporation is not reasonably supplying the demand for any particular style

73 of light vehicles except its two leading styles, the said Charles E. Duryea shall have the right to license elsewhere its manufacture. Said sum of ten thousand (10,000) dollars to be paid to the said Charles E. Duryea by said corporation in addition to the stock to be issued to him shall be paid as follows: One thousand (1000) dollars in cash on the incorporation of the corporation; one thousand (1,000) dollars in cash as soon as said Charles E. Duryea shall demonstrate that said corporation is exempt from suit by the Peoria Rubber and Manufacturing Company as hereafter set forth; two thousand (2,000) dollars six months after incorporation; two thousand (2,000) dollars twelve months thereafter; two thousand (2,000)

dollars fifteen months thereafter, and two thousand (2,000) dollars eighteen months thereafter, the four last payments to be represented by notes of the corporation.

The said Charles E. Duryea shall furnish full and complete sets of drawings or blue prints covering all designs, parts, and necessary information requisite for the manufacture of motors and vehicles.

Said Charles E. Duryea shall serve the said corporation for the greater part of his time or at least seventeen days in each month for the term of at least one year after its incorporation at the rate of compensation of two hundred and fifty (250) dollars per month and so long thereafter as may be mutually agreed upon.

This agreement applies equally to the successors or assigns of the parties hereto.

It is also agreed that said Charles E. Duryea shall protect the Duryea Power Company and its successors and assigns from, and indemnify it against all suits and demands by the Peoria Rubber and Manufacturing Company, its successors and assigns on account of any claims by it or them arising from previous contracts between the said Charles E. Duryea or the Duryea Manufacturing Company and said Peoria Rubber and Manufacturing Company to the rights herein granted and shall secure his performance of this covenant by pledging to the Duryea Power Company, the stock, and notes which he is entitled to receive under this agreement until its exemption from such suits shall be demonstrated.

Witness our hands and seals the day and year aforesaid.

HERBERT M. STERNBERGH.	[SEAL.]
CHARLES E. DURYEA.	[SEAL.]
HENRY MILLHOLLAND.	[SEAL.]
HENRY CROWTHER.	[SEAL.]

Witnesses:

EDWIN L. MOYER.  
EVA A. RUTH.  
EVA A. RUTH.  
CECELIA B. SHANNON.

74 Mr. LEISER: I object to that as incompetent, irrelevant and immaterial.

Mr. DERR: I offer in evidence agreement marked Exhibit "C," C. E. Y., dated April 20, 1900, between Herbert M. Sternbergh and the Duryea Power Company, reciting that the said H. M. Sternbergh has paid to the Duryea Power Company in cash the sum of \$10,000, and agrees to pay the sum of \$15,000 on or about June 6, 1900, and assigns to the Duryea Power Co. the entire, absolute, full and exclusive ownership of all patents pertaining to the manufacture or use of automobiles, motors, propellers, &c., and all inventions of the description aforesaid, and agrees to transfer to the company, its successors or assigns, all patents of the description aforesaid, which he may hereafter control and all inventions, &c., whenever requested, and in consideration whereof the said Power Company agrees to issue to Mr. Sternbergh, 510 shares full paid shares of the capital stock of the company upon the payment of the whole amount of \$25,000 above named, including, however, in the

said 510 shares, four shares now standing in his name on the books of the company. The full text of the agreement being as follows:

"This agreement, made the twentieth day of April, A. D. one thousand nine hundred, between Herbert M. Sternbergh of the City of Reading, in the County of Berks and State of Pennsylvania, of the one part, and the Duryea Power Company, a corporation of the State of Pennsylvania, of the other part, witnesseth:

The said Herbert M. Sternbergh has paid to the said Duryea Power Company, in cash, the sum of ten thousand (10,000) dollars, lawful money of the United States of America, the receipt whereof is hereby acknowledged, and agrees to pay the sum of fifteen thousand (15,000) dollars additional in like lawful money to the said Duryea Power Company on or before the fifth day of June A. D. one thousand nine hundred, and hereby assigns and sets over to the said Duryea Power Company, its successors and assigns, the entire, absolute, full and exclusive ownership of all patents pertaining to the manufacture or use of automobiles, motors and propellers or parts of either, heretofore granter to or now controlled by him and all inventions of the description aforesaid heretofore made by him, and further agrees for himself, his heirs, executors and administrators, to assign, transfer and set over to the said Duryea Power Company, its successors and assigns, all patents of the description aforesaid which he may hereafter control and all inventions of the description aforesaid which he may hereafter make and all patents which may be granted therefor, and further agrees for himself, his heirs, executors and administrators at the request of the said Duryea Power Company, its successors and assigns, whenever requested to do and perform or cause to be done or performed, all such acts and to make and execute all such instruments of writing which said Duryea Power Company, its successors and assigns, may reasonably require for the purpose of fully carrying out the true intent of this agreement.

In consideration whereof, the said Duryea Power Company agrees to issue to said Herbert M. Sternbergh, five hundred and ten (510) full paid shares of the capital stock of the said Duryea Power Company upon the payment of the whole amount of twenty-five thousand (25,000) dollars above mentioned, including, however, in the said five hundred and ten (510) shares, four (4) shares now standing in his name in the books of the said company.

In witness whereof, the said Herbert M. Sternbergh, has hereunto set his hand and seal, and the said Duryea Power Company, acting by its President and Secretary, thereunto duly authorized by proper corporate action, has affixed its corporate seal, duly attested, the day and year first above written.

HERBERT M. STERNBERGH. [SEAL.]  
DURYEA POWER CO.,

By H. M. STERNBERGH, *Pres't.*  
HENRY MILLHOLLAND, *Sec'y.*"

Signed, sealed and delivered in presence of  
EVA A. RUTH.

Mr. DERR: For the purpose of showing that the 510 shares of stock issued to Mr. Sternbergh were full paid in accordance with the terms of the agreements. Are these agreement- admitted?

REFEREE: They are admitted in evidence.

Mr. LEISER: We object to any evidence for the purpose offered as incompetent, irrelevant and immaterial.

REFEREE: Do I understand this agreement to mean that he received 510 shares? Did he own any patents?

Mr. DERR: It is proposed to show the following state of facts. It is proposed to show by Mr. Hiester, who drew the papers and by the papers themselves that the entire issue of stock, that is to say, the entire One Hundred Thousand Dollars of stock was to be paid by the transfer of what Mr. Duryea had in the automobile line, including patents, licenses, etc., and Twenty-five Thousand Dollars furnished by Mr. Sternbergh. Mr. Duryea was to receive however, Ten Thousand Dollars from the Company in addition to the three hundred shares of stock which he was to have.

Mr. Sternbergh owned no patents and that was clearly understood by the parties, and Mr. Millholland owned no patents. These clauses were inserted because Mr. Duryea was agreeing to transfer all the patents he had, and in order to make the covenants fully mutual.

That in addition to the preliminary agreement of February 76

13th and the agreement between the corporation and Mr. Sternbergh, which are in evidence, and there is a similar agreement between the corporation and Mr. Millholland, and a similar agreement between the corporation and Mr. Crowther to the effect that they should have their shares of stock full paid on the same basis, it being therefore as if the stock had been issuer for Seventy-five Thousand Dollars to Mr. Duryea and Twenty-five Thousand Dollars to Mr. Sternbergh. The choice of the form in which the matter should be put was made by Mr. Hiester, the Attorney, the intent of the parties being expressly declared that the stock should be paid for in that way, and it being known to Mr. Duryea and all the other parties that Mr. Sternbergh owned no patents. This is for the purpose of showing that Mr. Sternbergh's stock is full paid.

Mr. LEISER: I would like to know whether that offer is subject to our objections.

REFEREE: I think it was made in answer to my question. I wanted to know if the claimant owned any patents.

Mr. WAGNER: We object to that offer in that for the purpose of the offer this agreement of April 20, 1900, between Sternbergh and the Duryea Power Company is entirely incompetent and irrelevant, and there is nothing in the agreement to sustain the offer founded upon that agreement.

Mr. DERR: If the Court please, I understood that the agreements were admitted.

REFEREE: These agreements are admitted for the purpose of showing the facts and circumstances under which Sternbergh became the owner of this stock. Anything contained in these agreements upon that point I want to be informed on.

Mr. DERR: These people went to the Attorney and stated what they wanted and the Attorney chose the form in which to put it.



We have a right to explain that and to show there is no basis for a claim against Mr. Sternbergh.

What I propose to show now is that there were like agreements between the Duryea Power Company and Mr. Duryea and between the Duryea Power Company and Mr. Millholland and between the Duryea Power Company and Mr. Crowther, the same as between the Power Company and Mr. Sternbergh, and to show that these agreements and the preliminary agreements were one transaction to show that the other agreements were made pursuant to the preliminary agreement.

REFEREE: I don't see what the agreements made with the other persons has to do with this.

Mr. DERR: They show that the whole thing was done in furtherance of the preliminary agreement.

77 REFEREE: Any agreements bearing on the fact how Sternbergh obtained those shares can be admitted to that extent.

Mr. DERR: We will now call Mr. Hiester.

ISAAC HIESTER, Esq., recalled.

By Mr. DERR:

Q. Who is responsible for the form in which this transaction was placed?

A. I drew all the papers and I am responsible for the form.

Q. What did the parties say as to how the stock——

Mr. LEISER: I object. It is absolutely incompetent. This preliminary stuff is absolutely incompetent and immaterial.

REFEREE: Proceed.

Q. What did the parties say to you they were to pay for the One Hundred Thousand Dollars of stock?

A. Their claim was that Mr. Sternbergh should pay to the proposed corporation Twenty-five Thousand Dollars; that Mr. Duryea should transfer certain licenses and the making of all patents, and that he should receive for his transfers Ten Thousand Dollars of the Twenty-five Thousand which Mr. Sternbergh paid in as part payment, leaving the corporation with a net result of Fifteen Thousand Dollars in cash and these patent rights, which Mr. Duryea proposed to transfer or have transferred.

Q. Why was there any clauses inserted that Mr. Sternbergh and the other parties should transfer their patent rights?

A. That came about in this way. Mr. Sternbergh, Mr. Duryea and Mr. Millholland contemplated having an active connection with the concern. They were binding Mr. Duryea to contribute these patent rights and any inventions which he might make and any patents he might use, and it was thought that Mr. Sternbergh and the other parties should be bound in the same way.

Q. Was there any patents that Mr. Sternbergh owned? Mr. Millholland had no patents?

A. There was no patents owned by them. The agreements used the same general language which was used in regard to Mr. Duryea.



When the corporation had this net result of Fifteen Thousand Dollars and the patent rights which Mr. Duryea was to contribute, the parties agreed that the assets should be capitalized at One Hundred Thousand Dollars, and they agreed upon the manner that stock should be contributed among the four. Mr. Sternbergh was to get 510 shares; Mr. Duryea 300 shares, and Millholland and Crowther each 95 shares. Subsequently after the incorporation, I drew separate agreements for each one following the preliminary agreement, and the one which I drew for Mr. Sternbergh has been admitted. These agreements were in furtherance of the preliminary agreement. I omitted to state in each of these agreements or to make any reference to the agreements of the other three, although the preliminary agreement expressly refers to the mutual covenants between them. As it has been suggested, it might have been better if I had made express reference to the preliminary agreement and the other agreements. In Mr. Sternbergh's agreement, the stock being not only for the cash but the contributions and covenants of the other three, because the entire matter was considered as a whole and the return of cash and property in the increase of capital stock, referred to the cash which Mr. Sternbergh put in and the patent rights which Mr. Duryea contributed for that property and the increase was pro rated among the four as they agreed.

Q. Did you draw up the return?

A. I drew up the return.

Q. That return is in evidence?

A. That return, if my recollection is correct, is for cash and property and had reference to these agreements drawn in pursuance of the preliminary agreement. There is no express reference to the other agreements but the reference intended by the word property. The word property is intended to refer to these agreements and the patent rights which Mr. Duryea was transferring. In regard to the patents, I had nothing to do with that and I referred them to a Patent Attorney to have the transfers made.

Cross-examination.

By Mr. DEYSHER:

Q. What property was transferred to the Duryea Power Company for the One Hundred Thousand Dollars' worth of stock?

A. Twenty-five Thousand Dollars of cash, of which Ten Thousand Dollars was paid to Mr. Duryea, and Mr. Duryea's patent rights.

Q. Were the patent rights assigned to the Company?

A. I cannot say. I said I was not a patent Attorney and they should go to a Patent Attorney to have that done.

Q. Was any assignment made by Mr. Duryea of any interest in these patent rights to Mr. Sternbergh, Mr. Millholland and Mr. Crowther?

A. There was no formal transfer that I drew.

A. Nor any assignment of the interest intended in the agreements. They were all acting in harmony and putting in the common lot what each agreed to put in.

79 Q. What did Mr. Millholland put in?

A. I cannot recollect that he put in anything. His stock was paid for by Mr. Duryea's contribution of patents.

Q. What did Mr. Crowther put in?

A. I cannot recollect that he put in anything, but it was paid for by Mr. Duryea's contribution of patents. Mr. Sternbergh paid for his contribution in cash. They all acted jointly in the matter.

By Mr. DERR:

Q. The stock was to be full paid stock when issued?

A. The agreements specify that.

Q. Did you draw up the first minutes embracing this?

A. If I could look at them I might remember. (Showing minute book.) I recollect drawing the By-Laws, and of course I drew the minutes for the increase of capital stock from One Thousand to One Hundred Thousand Dollars. I find that the resolution authorizing the issue of this stock to the four different parties is in the hand-writing of my clerk and I no doubt drew them. These minutes refer to the four separate agreements.

Q. On motion the following resolutions were unanimously adopted, Resolved, That this Company issue to H. M. Sternbergh full paid shares, etc. That resolution follows the agreements?

A. Yes, sir; first the agreements follow the preliminary agreement and were drawn by me.

Q. The idea was to put upon the minute book precisely how the thing was done?

A. That was done with this exception, that the mutual agreements for the contributions was not made a consideration in the others.

Q. That was not made part of them?

A. Yes, sir, in consideration for each other.

H. M. STERNBERGH, recalled.

By Mr. DERR:

Q. State what the consideration was that you were to pay and did pay for this stock?

Mr. WAGNER: If the Court please, I suppose this is under the same objection for the reason that he cannot contradict the minutes and the agreements in this matter. It is incompetent, irrelevant, and immaterial.

Q. What did you and your associates say that Mr. Hiester should draw up to represent the One Hundred Thousand Dollars of stock?

80 A. All of these things described in the two agreements he submitted.

Q. Did you have any patent rights?

A. No, sir.

Q. Did you say so?

A. Yes, sir.

Q. Can you tell why the clause was inserted that you should contribute your patent rights?

A. For the reason that Mr. Duryea had patents and was contributing patents and licenses under them, and the other three were bound as he was, simply as a matter of form binding them all alike.

Cross-examination.

By Mr. WAGNER:

Q. You never did transfer any patents to the Company?

A. No, sir.

Q. You never owned any?

A. No, sir.

Q. That is, from the beginning of the organization to the present time?

A. Yes, sir.

Q. You never transferred any property of any kind to the Company other than the Twenty-five Thousand Dollars?

A. I don't know as to that. I think I did.

Q. What is it?

A. You said property of any kind?

Q. Yes, other than the Twenty-five Thousand Dollars?

A. There was some minor things that didn't figure very much in value.

Q. They were so insignificant in value that it is not worth while taking them into account?

A. No, sir.

By Mr. DERR:

Q. You had no patents at the time and you stated that you had no patents, that was understood by everybody?

A. It was.

Q. Did you get any patents subsequently of the kind described in the agreements?

A. No, sir.

Q. Any inventions of the kind described in the agreements?

A. No, sir.

81 Q. So you have nothing of the kind described in the agreement and therefore undertook to make no transfer?

A. Exactly.

Q. What, if anything, then remains for you to do or to give under that agreement, but pay your stock in full?

A. Nothing.

MR. DERR: I offer the minutes of the Duryea Power Company in evidence (Minutes marked Exhibit "D" C. E. Y.), so far as they relate to this matter of stock, for the purpose of showing that whatever was done, was done openly and recorded on the minutes and upon the advice of Counsel, and for such other purposes as they may be competent for. I also offer in evidence the charter of the Association (Charter marked Exhibit "E" C. E. Y.) showing the original stock had been ten shares of the par value of one Hundred Dollars, four of which Mr. Sternbergh subscribed for. It is recorded in Charter Book, No. 5, p. 9, Berks County Records. A copy of the

same being also transcribed in the minute book. The minutes of April 20, 1900, read as follows:

"Office of Duryea Power Company.

READING, PA., April 20, 1900.

A meeting of the Board of Directors was held this day.

Present: Herbert M. Sternbergh, Charles E. Duryea and Henry Millholland, being all the members.

On motion the following resolutions were unanimously adopted.

Resolved, That this Company issue to Herbert M. Sternbergh five hundred and ten (510) full paid shares of its capital stock including four (4) shares now standing in his name in consideration of \$25,000.00 and his transfer and agreement to transfer to this company his ownership of all present and future patents and inventions pertaining to the manufacture or use of automobiles, motors and propellers or parts of either in accordance with the terms of an agreement dated this day which is hereby approved and which the officers of this company are hereby authorized to execute.

Resolved, That this company issue to Charles E. Duryea three hundred shares (300) full paid shares of its capital stock including three (3) shares now standing in his name and pay to him and to the Duryea Manufacturing Company, of Peoria, Illinois, the sum of One Thousand (1000) dollars and deliver to the said Charles E. Duryea notes of the Company aggregating Nine Thousand (9000) in consideration of the said Charles E. Duryea and the said Duryea Manufacturing Company licensing this company to manufacture and sell motors, propellers and light automobiles under all  
82 patents and inventions now owned or controlled or hereafter acquired by either of them in accordance with the terms of an agreement dated this day which is hereby approved and which the officers of this company are hereby authorized to execute.

Resolved, That this company issue to Henry Millholland ninety-five (95) full paid shares of its capital stock including one share now standing in his name and also one share standing in the name of Adam L. Otterbein in consideration of his transfer and agreement to transfer to this company his ownership of all present and future patents and inventions pertaining to the manufacture or use of automobiles, motors and propellers or parts of either in accordance with the terms of an agreement dated this day which is hereby approved and which the officers of this company are hereby authorized to execute.

Resolved, That this company issue to Henry Crowther ninety-five (95) full paid shares of its capital stock including one share standing in the name of Cameron E. Strauss in consideration of his transfer and agreement to transfer to this company his ownership of all present and future patents and inventions pertaining to the manufacture or use of automobiles, motors and propellers or parts of either in accordance with the terms of an agreement dated this day which is hereby approved and which the officers of this company are hereby authorized to execute.

On motion the officers were authorized to execute a lease from Mess. Haubner and Heller for factory property on North River Street, Reading, Pa.

On motion adjourned.

HENRY MILLHOLLAND,  
*Secretary.*

Mr. WAGNER: I desire to offer this certificate of stock, (Certificate marked Exhibit "F" C. E. Y.) 10 shares issued to H. M. Sternbergh. In addition we would offer the schedule of assets and liabilities as filed.

Mr. DERR: Mr. Wagner and Mr. Leiser are uniting together to defeat Mr. Sternbergh's claim on the ground that Mr. Sternbergh owes Twenty-six Thousand Dollars upon an unpaid stock subscription, and have been jointly resisting Mr. Sternbergh's claim. Mr. Leiser, one of the associates argues that Mr. Duryea did not make the assignments spoken of in the agreement, or that it does not appear, or that we neglected to prove that he made the assignments. It is now declared by Mr. Wagner, the other associate speaking for Mr. Duryea, that Mr. Duryea did not make the assignments.

I desire this to be put upon the record in order that it may appear and be taken into account that one of the lawyers jointly  
83     contesting Mr. Sternbergh's claims has admitted in Court that what the other associate says does not appear and has not been proven, namely, that Mr. Duryea did not make the assignments.

Mr. LEISER: By way of reply, I would state that this remark as to Mr. Derr's having failed to prove affirmatively as a part of this case in chief that Mr. Duryea has assigned certain patents and licenses of the company, and had just as much failed to make out his case as Mr. Wagner had, when as alleged by Mr. Duryea, he had failed to put Mr. Duryea upon the stand. I negative the assertion made by Mr. Derr that for the agreements referred to and the understanding of the parties to these agreements, Mr. Sternbergh was to have the benefit of Mr. Duryea's contribution to the capital of the corporation.

Mr. WAGNER: To which you will add my statement. That in this matter the statement by Mr. Wagner was that he represents Mr. Aldrich and a certain number of other creditors. The creditors he represents are distinct from the creditors represented by Mr. Leiser, and that the only form in which the term Associate Counsel is used in this proceeding is, that this is a common cause enuring to the benefit of all the creditors.

REFEREE: We will adjourn at this point to 10 o'clock A. M. June 21, 1907.

Adjourned first meeting, Friday June 21, 1907, at 10 o'clock A. M.

Mr. WAGNER: I again offer the proof of claim of A. G. Spalding & Co.,—\$34.50. There has been objections made and I would like to have the objections produced.

REFEREE: Is there any objection to that.

MR. DEYSHER: There was an objection made to it yesterday.

REFEREE: I am in considerable doubt as to the correctness of the conclusion at which I have arrived. I would have preferred to have had more time to inform myself on this matter. It is necessary to elect a trustee as early as possible, and therefore I will decide whether or not this claim of Sternbergh may be proved for voting purposes at this time, without prejudice to any rights he may have. He may except to this decision and offer a claim for proof later.

In the first place, I am in doubt as to whether there was a subscription or not, I am inclined to think there was no subscription of the 510 shares held by Sternbergh. There is no evidence of any kind that there was a subscription except an inference which may be drawn from the evidence submitted, namely, that Sternbergh was an original owner of stock to the extent of 510 shares, but to  
84      counteract that we have these agreements which seem to show that the stock was issued to him as full paid in return for Twenty-five Thousand Dollars (\$25,000). The minutes of the company, Minute Book, p. 12, date of April 20, 1900, also show the stock to have been issued in return for certain things, therefore the evidence of subscription is not very clear.

Examining these agreements, I find that the agreement dated February 13, 1900, which might be called the Articles of Association, and which binds the parties to organize a corporation with a capital stock of One Hundred Thousand Dollars, to be called the Duryea Power Company, and that Sternbergh should receive five hundred and ten (510) shares of one thousand shares (1000). It was therein agreed that Sternbergh should contribute Twenty-five Thousand Dollars (\$25,000) to the corporation, and should also contribute any licenses or patents he might have.

In this same agreement it was agreed that Charles E. Duryea should, in consideration of Ten Thousand Dollars (\$10,000) and three hundred shares of stock, transfer to the corporation his licenses and patent rights. It has been maintained that this transfer of licenses, patents, &c., was made under this agreement to the various parties thereto, and therefore that they had gotten title to this property to wit, licenses, patents, &c., held by Duryea, which the- transferred to the Duryea Power Company in consideration of the shares of stock issued to them.

I do not find anything of that kind in this agreement. I find that the parties agreed to give certain things to the corporation to be formed and not to themselves as common property, and that therefore they do not have any property or title in these patents, licenses, &c., as individuals, but that the property, namely, licenses, patents, &c., belonged first to Duryea and afterwards was to be turned over to the Duryea Power Company by him.

Following that agreement we have the agreement of April 20, 1900, which is nothing more than an agreement between the Company and Sternbergh to transfer to Sternbergh the capital stock of five hundred and ten shares (510) in consideration of twenty-five Thousand Dollars (\$25,000) in cash and his transfer of patent

rights, licenses, &c., referred to in the agreement of February 13th. I cannot find that Sternbergh became the owner of any patent rights, licenses, &c., under the February 13th agreement. His entire testimony showed that he never owned any outside of what were mentioned in this agreement of February 13th, and the agreement of February 13th cannot be construed to give to Sternbergh the patent rights, licenses, &c., of Charles E. Duryea. That property was to be assigned to the Duryea Power Company and part of the effect of the agreement was to bind Duryea to turn it over to the Duryea power Company.

85 On a subscription of stock a subscriber is liable to creditors of a bankrupt corporation for an unpaid subscription, but as I said before, I cannot exactly see there was a subscription. I find, assuming that Sternbergh did not subscribe for his five hundred and ten shares of stock, although as I said before, I am not too sure that it was not his subscription, the following facts: Five hundred and ten (510) shares of stock of the Duryea Power Company, par value One Hundred Dollars each; total value, Fifty-one Thousand Dollars were issued to Sternbergh on April 20, 1900, by the Duryea Power Company of which he was President. He paid for the stock Twenty-five Thousand Dollars (\$25,000) and no more. He didn't turn over to the company any other property or rights of any kind. He received these shares as full paid, whereas they were not paid half. The stock was in that respect what is called watered stock. The Duryea Power Company by its officers reported to the State Department that its capital stock of One hundred thousand Dollars was fully paid in cash or property, whereas, in fact, as far as Sternbergh is concerned, it was not paid to the extent of Twenty-six Thousand Dollars on his shares.

The Duryea Power Company becomes a bankrupt. Sternbergh presents an unsecured claim for proof, amounting to about Fourteen Thousand Dollars, and it is proposed to vote this claim, if allowed, in the selection of a trustee. I think that under these facts the following proposition is correct. Bankruptcy having intervened, the right of creditors step in. They have given credit to the corporation on the strength of sworn returns to the State Department. That was their only source of information. A technical fraud has been perpetrated against them and it seems to me that they should have the benefit of unpaid stock, represented to them as having been fully paid.

A holder of stock issued to him for much less than its face value owes a debt to the creditors of the corporation which can be set off against a claim that he may have against the corporation. As I said before, I am not absolutely sure that what I have just said is the law. I should have preferred to have more time, but the claimant can except to this decision, and what I say here is without prejudice to his right to offer his claim in the future. Believing therefore that Sternbergh is indebted to the Company for an unpaid portion of his stock and that this indebtedness enures to the benefit of the Trustee in bankruptcy for creditors, and following up by the belief that the claimant who owes on his stock cannot prove the claim unless that debt is settled, I am bound to conclude that the claim of



H. M. Sternbergh cannot at this time be offered and allowed for voting purposes unless he first pays what he owes the Company.

86 Mr. DERR: We will file exceptions on the part of H. M. Sternbergh to Referee's decision.

CHARLES E. DURYEA, Recalled:

Mr. WAGNER: There is no entry made of Eight Thousand Dollars of notes for the assignment of licenses and his patents and neither is there an account of Two Thousand Dollars of cash which they were to pay in addition to the Eight Thousand Dollars of notes. They paid it but didn't charge themselves with it, so that would make in addition to the finding of Two Thousand to the twelve Thousand Dollars. Interest due on the three separate notes still held would amount to \$693.66, \$710.00 and \$680.00, making Two Thousand Dollars more, so you will see according to their own expert there is at least an indebtedness of Fourteen Thousand Dollars, and the balance we can show to within a thousand dollars. To expedite things we are willing for the referee to find against these matters and we can file exceptions.

REFEREE: It is agreed that Duryea has a claim of Fourteen Thousand Dollars or less.

Mr. DEYSHER: We will examine Duryea.

By Mr. DEYSHER:

Q. Does that statement (indicating) outside of the last items include any notes that were to be given to you?

A. I don't understand that it does. I understand this statement to be free from any mention of notes being a part of that Ten Thousand Dollars.

Q. You have charged in your statement, Salary from April 1, 1900, to December 1, 1906, at \$250 a month, total, \$20250?

A. Yes, sir.

Q. You know that several years, a year or two or two and a half years, after the company was organized that Mr. Sternbergh reduced your salary because the Company was not making sufficient financial progress?

Mr. WAGNER: I object to that for the reason that Mr. Sternbergh has no authority to reduce the salary. The salary must be reduced by the Board. When an agreement is made with a man, the President cannot reduce the salary without the Board acting on it.

REFEREE: You may ask whether he agreed to accept less.

Mr. DEYSHER: I will ask for your ruling on this matter.

Q. (Question repeated.) You know that several years, a year or two or two and half years, after the company was organized  
87 that Mr. Sternbergh reduced your salary because the Company was not making sufficient financial progress?

REFEREE: The question as it stands cannot be asked.

Mr. DEYSHER: I want an exception to that.

REFEREE: You may ask whether the salary was reduced by corporate action.



Mr. DEYSHER: I propose to show by the witness on the stand whether at the end of the year after the incorporation of the Duryea Power Company, H. M. Sternbergh, the President, did not reduce the salary of the witness to One Hundred Dollars a month. That the witness was informed of the reduction of the salary and continued in the employ of the Duryea Power Company.

Mr. WAGNER: To that we propose the same objection as before.

REFEREE: You can ask whether he accepted a reduction. There is no objection to the inquiry.

Q. Is it not a fact that after the first year you were notified that Mr. Sternbergh had reduced your salary to One Hundred Dollars a month?

A. After the first year, Mr. Sternbergh and I had a conversation on that point and I refused to accept any less money because I had offers of two or three times that money and I could not afford for the benefit of my family to take less than Two Hundred and Fifty Dollars a month.

Q. Can you fix the date of that conversation?

A. I cannot fix it as close as two or three months. I should say it was a couple of years after the formation of the Company. That might have been a year. Several months or perhaps another year later, the same subject came up and he thought I ought to accept less money and I explained my position and refused to accept less. Some time after that, Mr. Hohl, who was our bookkeeper at that time, came to me out in the shop while I was talking to another man, and he said that Mr. Sternbergh had instructed him to reduce my credits for salary to One Hundred Dollars a month. I understood him to say Two Hundred Dollars a month and I saw a difference of Fifty Dollars and would not stand for that. I said to Mr. Hohl, "You leave that matter in *my* abeyance and I will take it up with Mr. Sternbergh." Possibly it was another year before I learned that Mr. Hohl was crediting my account with One Hundred Dollars and I said that was wrong and that I didn't consent. The book will show the entries in that way.

Q. When did Mr. Hohl become connected with the Company?

A. Four years ago.

Q. Four years from this time, that would be 1903?

88 A. Some time in the spring of 1903 but I am not sure of that.

Q. Did you come to any agreement with Mr. Sternbergh at the time he told you the salary was to be reduced, or was the matter simply left in abeyance?

A. It was distinctly understood from my side that I would not accept a lower salary.

Q. You mean you would not take less than Two Hundred and Fifty Dollars a month?

A. Yes, sir.

Q. And Mr. Sternbergh said the salary was to be reduced?

A. No, sir, he asked me if I would accept less and I refused. He never advised me my salary was to be reduced.

Q. There was no agreement as to what the salary should be as between you and Mr. Sternbergh at that time?

A. There was no change in the salary between I and Mr. Sternbergh from the contract.

Q. Neither was there any agreement between you and Sternbergh as to the amount of the salary at the time of that conversation?

A. It was understood my contract was Two Hundred and Fifty Dollars per month and that was what I was credited with.

Q. There was no further agreement between you and Sternbergh at that time?

Mr. WAGNER: I object to that.

A. Tacitly I understood that Mr. Sternbergh agreed that I would not accept less than two Hundred and Fifty Dollars.

Q. There was no agreement between you at that time as to what the salary should be?

A. No, sir, that was a matter for the company.

Q. There was no agreement with the company?

A. I had my written agreement.

Q. The agreement which was offered in evidence yesterday?

A. Yes, sir.

Q. For the years 1901 and '02, 1902 and '03, you did draw over twenty-nine hundred dollars (\$2,900), and for the years 1903 and '04, you only drew \$1,169, how do you account for that?

A. I do not know that that is a fact and therefore I do not attempt to account for it.

Q. Look over that account and tell us how much you did draw in April, 1903 and 1904? (Indicating.)

A. I don't find anything on this account that indicates I drew any salary. There are a number of cash items, but I don't think they are marked as salary.

89 By the REFEREE:

Q. Do you claim salary?

A. In order to get at this account, it was agreed at the meeting of the directors that the best way would be——

Q. I mean only the salary?

A. Yes, sir. I make a claim for salary, two hundred and fifty dollars per month, from the beginning of the company.

Q. What are the actual unpaid items?

A. I had no way of getting at that except by putting on one hand the amounts I received from the company and on the other hand the amounts due me by the company.

Q. What is the balance?

A. The balance on salary is not separated from the other. I had no way of getting at it.

By Mr. DEYSHER:

Q. Look at the items between 1903 and '04 and see whether the total amount of cash and expenses which you received was not cash, \$1,169.00, and expenses, \$.75?

A. From what dates, please?

Q. April, 1903, to April, 1904?

A. Was that including 1903, or including 1904, or including both?

Q. From April, 1903, to April, 1904, one year?

A. I find \$1,458, including that \$.75 expressage, part of which was paid to other people apparently from the entry.

Q. But as a matter of fact, after Mr. Hohl came there on June 5, you drew \$100, and July 9, you drew \$150, didn't you?

A. That is the way the entry shows here.

Q. That is your account taken from the book?

A. Yes, sir, I was not disputing that.

Q. On August, \$750, and August, \$1,950?

A. July 6th you overlooked, August 6, \$10, you overlooked. Those items are correct.

Q. September 1st, \$100?

A. Yes, and August 31, \$51.15.

Q. November 19, you drew \$100?

A. Yes, sir.

Q. December 17, \$200; February 9, \$100. Is that correct?

A. That is correct as far as it goes. You overlooked some of the smaller items.

Mr. WAGNER: If this is a matter of record, I object to taking part of cash received out of an account, merely to suit the convenience of the questioner in this matter for the purpose of making it appear that the salary was one hundred dollars, when the account shows that at other times there were different items paid.

Q. April 22, you drew \$200?

A. April 21, I have here.

Q. April 26, \$100?

A. Yes, sir.

Q. Was not the total for that year, \$1,348.43?

A. It might have been. I made it \$1,458.93, and I did not include the 2nd of April you mentioned just recently.

Mr. WAGNER: What is the purpose of these questions?

Mr. DEYSHER: I am showing that the years 1903 and 1904 he accepted a salary less than one hundred dollars a month.

A. If they look at the other side of the account, they will find I paid money to the company.

By the REFEREE:

Q. Were the payments of salary entered in this period or any other periods on the books of the company, payments in full or on account?

A. At the very beginning there was an attempt to pay in full. That continued for about a year. After that the salary was paid on account because the company needed every dollar, and I was willing they should use my money and I didn't draw anything except what I needed to live on. I had some money coming to me from the outside, money that I earned, and that was used for the company, but I didn't care to accept one hundred dollars a month for salary at any

time. At first when I came there I didn't send for my family but afterwards I sent for them. I could not afford to take less.

By Mr. DEYSHER:

Q. Do you know whether or not the amount paid you for the years 1904 and 1905 in cash was \$2,416.25?

Mr. WAGNER: What is the purpose?

By Mr. BERTOLET:

Q. How much did you get on account of salary in that time?

A. There are no entries for salary as late as that as I explained. At first there was an attempt made to pay and later it was cash on account, so there was no entry for salary in later years. My salary was not paid up and we could not keep track of it as salary.

By Mr. DEYSHER:

Q. Do you know what this is, April 1905 and 1906, \$1,855.26, in cash?

A. I have not added it.

91 Q. 6,487.83, April, 1906, to December 31, 1907?

A. I don't know the amount. It was not salary. I find, To Bills for the Company, and, Received Money from the Company. These things are shown and can be found on the books.

Q. The checks came in to the Duryea Power, which you deposited to your private account?

A. And paid out for the benefit of the Duryea Power Company.

Q. Out of that you paid bills of the Duryea Power Company?

A. That happened in some instances. One instance, Mr. Sternbergh was away. We had no one to sign the checks and the check was turned over to me and my private check went out to pay the company's bills. These transactions are open and will bear investigation.

Q. You did use that method for quite a good while?

A. No, sir. For a few times only. There were reasons why we were obliged to take that method.

Q. The reason was that the account of the Duryea Power Company was overdrawn?

A. No, sir. I deny that. That might have been once or twice but that was not the reason.

Q. If a check had been deposited to the Duryea Power Company and the money was deposited to your credit, it was paid out on other matters?

Mr. WAGNER: I object to that. It is entirely immaterial and irrelevant and has no bearing upon his claim.

REFEREE: Objection sustained.

Mr. DEYSHER: Exception to that.

By Mr. DEYSHER:

Q. And those items are all included in this account, are they not?

A. In making up this account the items that did not seem to have a balance were included, but where the items had a balance as of

the checks received and paid out for their benefit, those are not included in this account.

Q. Then your account does not include all the items of account between you and the Duryea Power Company?

A. No, sir, it does not. Where there are balances, it does not include it. Everything that does not balance, I believe is included.

Q. Have you found it necessary or convenient to take money which came to the Duryea Power Company to deposit it in your own private account and paid bills of the Duryea Power Company out of your private account, out of that money?

Mr. WAGNER: Objected to. What is the purpose?

92 Mr. DEYSHER: The purpose is to show that those items are not included in this account, as he says, and if they are not, his account is not correct.

REFEREE: You may ask whether the account contains all the items.

Q. (Question repeated:) Have you found it necessary or convenient to take money which came to the Duryea Power Company to deposit it in your own private account and paid bills of the Duryea Power Company out of your private account, out of that money?

A. Yes, I think that was done.

Q. And those items are not all included in this account?

A. I cannot say that they are not. I say that those items that did not apparently balance were included in this account. Where the amount paid equaled the amount received, those items were not included in this account. This account was taken from the form prepared by Cunningham. I enlarged upon and corrected it. I found he had left items apparently balancing in his account and I did the same.

Q. Is that account the exact copy of the account made up by Cunningham?

A. I started with Mr. Cunningham's account as a basis. I checked every item I could and where I found an error I changed it. So this account is not the exact copy of Mr. Cunningham's account.

Q. Where are those notes you have included in that account? (Notes handed by Mr. Wagner.) You have charged ten thousand dollars for these notes, have you not?

A. Cash and notes as per contract, ten thousand dollars (\$10,000). That is the way the item reads.

Q. What credit have you given here for the note that was paid?

A. On the first page of the debit account, at October 31, you will find, vehicle, Wheeler, \$1,200. The \$150 on the note in front of you is part of the payment for that vehicle and part of the note proceedings was also paid by that vehicle. What cash in addition applied on that note, I do not know. I don't know whether the date of October 30 is correct, because, the vehicle was not delivered until a little later than that. That is, October 30, 1900, as it shows on the record.

Q. There are two vehicles, October 31, one of \$1,500, and the other of \$1,200?

A. Yes, sir, the both dates are incorrect.

Q. You got the vehicles?

A. I got both vehicles.

Q. That is \$2,700?

A. Yes, sir.

93 Q. On the same page, under date of June 21, and 28, you credit two notes of \$500.

A. The entry so stands and was taken from the company's books, and the word "note" in the company's books is "expenditure," added in red ink. That was added by some one. I don't know who. I don't think either of these payments were on the note because there were no notes due at that time. I copied these words from the Cunningham account. It is my belief that these two payments were part of the cash referred to in the contract.

Q. Do you have any way of ascertaining the date of the delivery of the Wheeler vehicle?

A. The correspondence connected with the vehicle probably is still in existence, although I am not sure if that would tell the date of the delivery of the Wheeler vehicle, but it might give it apparently pretty closely. It was later than that time because we had only finished one vehicle and that was finished about August.

Q. That was August, what year.

A. 1900.

Q. And the Wheeler?

A. Was after that because we had not completed the second vehicle. That vehicle was given to me. It was second-hand and I sold it as such.

Q. Vehicle No. 1 amounts to \$2,700?

A. Yes, sir.

Q. That paid the one note of \$2,000?

A. No, sir. The Wheeler vehicle paid up the balance of the first note and \$150 on the second note. The first vehicle I think was paid in cash because there was no note due at that time.

Q. On the note June 23, 1900, which was payable April 6, 1901, appears this endorsement: "On this note there was paid \$150, as per C. E. Duryea's receipt of April 15, '02?"

A. I think that is correct.

Q. That is your handwriting?

A. Yes, sir.

Q. When was the endorsement made?

A. Whenever I and the bookkeeper got together and tried to square up that Wheeler vehicle. I am sure that is not the date of the Wheeler vehicle. That was delivered after the Chicago show and that was held some time before that. That is another reason why I am sure that is not the correct date.

Q. You never had ten thousand dollars in notes, did you?

A. No, sir, the contract does not provide for ten thousand dollars in notes.

94 Q. Why should you credit ten thousand dollars in notes?

A. I did not.

Q. You have a credit of ten thousand dollars on your account?

A. I don't understand it so. It is cash and notes.

Q. Suppose you take that account and go over that. The company started owing you ten thousand dollars?

A. Yes, sir according to the contract.

Q. Go over that account and let us know what the charges were for and what the credits are for?

A. That is impossible because I cannot remember all these things. A good many of the items I secured from the company's books and some from your own. In many cases it does not show what they were for.

Q. Two hundred and fifty dollars was a motor?

A. Yes, sir. I brought that motor with me from Peoria, Ill., in the early part of March.

Q. The next item is, \$235, salary?

A. Yes, sir. That made the \$250. There was a little expense I paid out for the typewriter girl.

Q. What is the next item?

A. I don't know anything about that. I found that in the account. I don't believe it is correct but had no way of disapproving it, so allowed it to remain. I don't think I had expenses \$410.54 at that time?

Q. The next item?

A. It is for April, according to the check stub.

Q. Did you get that from the check stub?

A. Yes, sir, as I understand the record of the Duryea Power Company.

Q. What is the next item?

A. Freight on boat, \$69.50. I had a boat shipped from Peoria, Illinois.

Q. What is the next item?

A. Cash, balance of salary for May, \$167.78; \$2.72, expenses of some kind. Making a total of \$180.50.

Q. There are two items, salary for March, \$235, salary for April, \$245 and another of \$167.78, balance salary for May together with \$69.50, and for these three months you have charged \$250 a month?

A. Yes, sir, and for these three months I was paying out some money and that money was paid to the company and deducted from the amount.

95 Q. On April 23 you received \$235, which is cash for salary in March?

A. Yes, sir.

Q. That is your salary in full for March?

A. Yes, sir, and I have so credited it here.

Q. You credited it \$235?

A. No, sir, I have \$250 here.

Q. The next is cash of May 3, what is your item?

A. Cash, salary, April, \$250, see check stub.

Q. Is not the check stub \$245?

A. Yes, sir, I got the other in small expenses and gave credit.

Q. Balance, June 13, for May. You have it cash?

A. This indicates June 1, cash, balance salary for May, check

\$167.78, bills, 2.72, and the \$69.50 on the boat makes \$250 for May. \$2.72 does not appear.

Q. Where does the \$2.72 come from?

A. The difference between the \$250 and the other item. It was paid out for some little expenses I have no record of.

Q. You added \$2.72 in order to total \$250.

A. Yes, sir.

Adjourned to Friday, June 21, at 2 o'clock, P. M.

Adjourned first meeting to Friday, June 21, at 2 o'clock, P. M.

Mr. DEYSHER: I offer the following proofs of claim with Powers of Attorney:

John Ball, \$100, advanced in the purchase of an Automobile.

National Spring and Wire Co., dated June 4.

Samuel Garson, on account of Auto..... \$40.00

Hercules Electric Co..... \$2,227.50

CHARLES E. DURYEA, recalled.

By Mr. DEYSHER:

Q. Next item is Cash, \$50, on June 21, what was that?

A. I think that is one of the two I mentioned this morning as being probably part of the cash which was contemplated in the contract. They were marked in the Company book in red ink. These were two items of June 21 and 28th.

96 Q. (Book shown witness.) Look at that (indicating).

Here are these two items of \$500. It looks as if it had been made originally; it is in ink?

A. No, sir; one is in ink and one in pencil. The original is not pencil.

Q. I mean the two notes?

A. No, sir; that is a pencil note and the original entry is in black ink.

Q. This book has been through the flood?

A. Yes, sir; I think so.

Q. What is the next item?

A. June 1, \$250, cash. That has been marked with a note, Motor D. M. Co. I understand that to be a cash payment. These accounts are so old I cannot state with certainty. The motor shown in the third item of the credits as having been billed June 11, the date of entry in the book being July 2.

Q. You have it marked there D. M. Co., but there is no mark on the book?

A. The Duryea Manufacturing Company was a little concern in which I was interested before I came to Reading. They supplied three motors to the Duryea Power Co. with which the 1st, 2d and 3d vehicles were built. I am sure of the first and second, but the third I am not so sure of.

Q. D. M. Co. is simply a memorandum from your own recollection?



A. It was the title of the company, and knowing where the motors came from, I made the memorandum that way. This does not show what the original entry was or where I got it from.

Q. What is the next item?

A. July 2, cash, H. M. Sternbergh, mailed to Peoria, \$750. That is the way my record shows.

Q. That was Mr. Sternbergh's check to you?

A. I don't know whether that check went to me or to D. M. Co., but I have given the Duryea Power Company credit for it. These two accounts were not kept separately very long. The Duryea Manufacturing Company was started separately, but they were not kept separately.

Q. There is another account here of the Duryea Manufacturing Company which does not include that \$750. That must have been Mr. Sternbergh's check to you?

A. I cannot say.

Q. What is the next item?

97 A. July 12, cash, salary for June, check \$158.34 bills, \$91.66, equals \$250.

Q. What is the next item?

A. August 11, cash salary for July, check 141.42, bills \$108.58, equals \$250.

Q. You have given credit for \$250?

A. Yes, sir.

Q. What is the next item?

A. August 31, Premier Manufacturing Co., \$5.15.

Q. Give us the next items?

9. September 4, cash, check \$162.99, bills \$7.20, bills \$79.81, salary \$250. September 31, telegram, \$.41; October 4, cash September salary, 136.58; bills \$63.79 and \$47.63; total \$250.

Q. You have taken \$63.79, \$138.58 and \$47.63 together?

A. Yes, sir.

Q. What is the next item?

A. October 31, vehicle No. 1, \$1500, but as I stated this morning that is incorrect.

Q. That was on account of one of the notes, was it?

A. No, sir. I don't understand it so. That vehicle was sold to a man in Pittsburg, damaged by the Express Company, refused by him and bought by me and Allen McNorton, of New York, and I think I paid for it in cash. There were no notes due at the time.

Q. Do you have a check or any other evidence of the payment in cash?

A. That I cannot say.

Q. How do you refresh your recollection?

A. I asked Mr. Sternbergh over the phone about my purchasing that vehicle. I explained that I would pay so much then and so much a little later. I don't remember the amounts but I remember getting his consent to that deal over the phone.

Q. Therefore, you think that did not enter into the note transaction at all?

A. I don't think it does.

Q. What is the next item?

A. October 31, vehicle Wheeler, \$1200. That is incorrect as to date.

Q. What is that item, is that a note?

A. Part of that went on the first note and \$150 on the second note as per the endorsement on the back of the second note.

Q. That settled the first note in full?

98 A. It paid the balance remaining unpaid on the first note.

Q. Do you know any way of fixing those notes?

A. I don't have it with me. I think the correspondence would show it was delivered shortly after the Chicago show. That was held about February, 1902. It might have been 1901. I am not sure of that.

Q. What is the next item?

A. November 5, cash October salary, \$250. Nov. 20, cash, \$750.

Q. What was that item?

A. I don't know. I have no record here.

Q. What is the next item?

A. February 1, \$14.

Q. Do you know anything about that?

A. I do not.

Q. What is the next?

A. March 18, \$135.64 and \$114.36, total \$250.

Q. What is the next?

A. April 6, cash, see check stub 579, \$25.00, I understand that to be the Duryea Power Company's check stub.

Q. Didn't you go over it yourself?

A. Yes, sir; but I had also my own check stubs, and there is a possibility of error, but I don't have my checks numbered as high as the Company.

Q. What is the next?

A. April 15, cash. My note indicates December. April bills, \$89.35 and \$160.65. That would look as though it would be a December bill, but that cannot be possible.

Q. What is the next?

A. May 1, cash, January bill \$94.43, check, \$158.57. I think I can explain that April bill. The item of January bill indicates that during the month of April as during the month of January I had certain work or expenses which the Company paid and the April bill was taken for my December salary and the check was \$160.65.

Q. What are the next items?

A. June 20, cash, February salary, bill \$92.48, check \$157.52, total \$250.

July 9, cash March salary bill \$94.82, bills \$155.18, total \$250.

July 23, April salary, \$50. July 31, April salary, \$50. August 20, cash April salary, \$75. August 23, cash N. Y. Wagon, price \$1200 no credit, \$600. I understand that to be after McNorton and I went down with vehicle No. 1, which was returned to the Duryea Power Company and sold to them and they afterwards  
99 sold it to other parties. They paid me on this date \$600 on account of that vehicle, but I think the books of the company

show they didn't credit me for the vehicle, and in my account I have taken credit for it.

Q. You say you have taken credit for what?

A. For \$1200.

Q. What is the next item?

A. September 16, cash 878. I think that would be the number of the check stub. Amount, \$25 Sept. 21, cash check stub 883, the correct date is Sept. 18, \$46.00, but the amount extended is \$50. The difference of \$4 I am not able to explain, but have given the company credit for the fully Fifty. The other Four was probably paid in cash.

Q. What is the next item?

A. October 2, cash check stub 924, \$50. October 11 cash check stub 927, wagon, \$100.

Q. What was that?

A. I understand that the number of these payments here are a part of the settlement of the New York wagon, and this particular one at One Hundred Dollars is part payment of the wagon. The other items do not have that mentioned. The next is October 16 cash check stub 929, \$100. The next is October 28, cash check stub 942, \$50.

Q. These items you think are part of the \$1200 consideration for the wagon?

A. If you look down to the item of December 3, check stub, 1026, you will see a net balance N. Y. \$100. I understand that is part of the payment for New York wagon and added up you will find about Thirteen Hundred Dollars. It may have been that was the price they were to pay for the wagon. I sent Mr. McNorton a check for \$450 and he owed me \$150 and it may be the amount I sent him was \$650. I copied a few of the items.

Q. What is the next item?

A. Nov. 1, cash check 947, \$50. November 13, cash check 987, \$75. Nov. 20, cash check 997, wagon, \$100.

By Mr. WAGNER:

Q. What does that word wagon mean?

A. Some of these words wagon came from the check stubs and on the original I had marked them with quotations, and I cannot be sure.

By Mr. DEYSHER:

Q. You mean on the Cunningham statement?

100 A. Yes, sir. That is in quotations (indicating). There are three that are quoted from the books of the Company.

Q. Give us the next items?

A. December 13, check No. 1026, balance N. Y. wagon, \$100. December 23, cash 1034, \$50. January 4, cash check 1042, \$100. January 16, cash check 1059, \$100.

Q. You have no recollection or note of either of these items?

A. No, sir.

Q. What is the next?

A. February 25, cash check 1096, 500 less 300 advanced pay roll, \$200.

Q. Where do you get that?

A. I cannot tell *for* this where I got it. Either from my check stubs or from the Duryea Power Company but the number of the check would indicate I got it from the Company's check stubs. I think I advanced them Three Hundred to meet the pay roll and they gave me Two Hundred on my account in which I gave them credit for the Two Hundred.

Q. What are the next items?

A. April 15, cash 1154, in payment of loan, \$200. April 26, cash check 1173, \$250. I think the memorandum of \$75 on July 1, salary \$175 on August 1. The next is June 9, cash 1269, \$75; August, \$175; September 1, salary, total \$250. July 3, cash check 1300, \$75; Sept. 1, salary \$75; *Sept. 1 salary \$75*; on Oct. 1 salary, total \$150.

Q. Do these memoranda appear to the stub?

A. I cannot say that. I went over it in December and don't remember.

Q. What are the next items?

A. July 22, cash check 1394, cash forwarded, \$25. Aug. 21, cash check 1394, October 1, salary, \$75. August 28, cash 1416, \$100. September 8, cash 1448, \$100.

Q. You have no recollection as to what the payments were for?

A. No sir. Some I found in Cunningham's original statement and I didn't look them up. I assumed that he had looked them up.

Q. What are the next items?

A. October 4, cash \$200. October 20, Standard Welding Co., \$1.50. I think that was something I purchased from the Standard Welding Co. and the Company paid for it, or that the Company bought of me. The next is November 4, cash, \$100.

Q. Have you any recollection of that?

A. No, sir.

Q. Give us the next items?

101 A. November 29, cash, \$100. December 23, cash, \$50.

December 27, Jones' -ages, \$36. Part of the time I had experimental work of my own and the workman who did the work was paid by the Duryea Power Company and they charged his wages up to me.

The next is December 26, A. R. Mosler, plugs, \$1.85. December 15, Ex. Brass plating, \$2.57. I think that was plating done by the Excelsior Brass Company.

The next was January 3, cash, \$50; January 13, wages, Jones, \$9.00; January 17, cash, \$50; January 21, cash, \$100; February 7, cash, \$341.00 or \$499.80. Mr. Cunningham had me charged with \$500, and I gave the company a credit of \$500. I am sure there is an error of twenty cents, and is is not clear to me how the difference came in. I gave them credit for the full amount but I am sure of an error of twenty cents.

Q. Where do you get \$341.09?

A. I cannot give you that, but went over it in December trying to get it straightened out. I found how the other amount got there

and succeeded in getting it to Five Hundred with an error of Twenty cents, but I think \$349 is the right amount but I gave the company credit for the other.

Q. How did you find Cunningham had got \$499.80?

A. There was a number of checks made out by me to pay the company's bills and that check of \$500 was given me to balance that. I cannot remember the details.

Q. You did get the check of \$500?

A. Yes, sir, and I have given them credit for \$500.

Q. If you got the check for \$500 the credit must be right?

A. No, sir. If I paid out part for the company, I should only give the company credit for the difference.

Q. Do you know what it was for?

A. I don't know. I could not give you that.

Q. (Showing book.) That is the ledger of the Duryea Power Company?

A. That is one of the ledgers.

Q. Who was the bookkeeper at the time?

A. I am not enough familiar with the books to swear to that handwriting. I think it is Mr. Hohl's, but I am not sure. I could not say who was the bookkeeper.

Q. That has been posted from the original entry, p. 11, of the other book?

A. I have given credit for the whole \$500, but I know there was an error of twenty cents, if not more.

102 Q. On January 31, there is an item here and in the book of wages, Jones, \$9.00?

A. I paid the money to Jones at the show, but it was not my expenses because Jones was doing work for the Duryea Power Company.

Q. From the books, however, it says January 31, wages, Jones, as from page 10, \$9?

A. On my note it says, see check stub, and I think that shows what it was paid for.

Q. Give us the next items?

A. February 16, cash Jones wages, \$40.50; February 25, cash D check book stub, \$200; March 3, cash, \$490.59.

Q. What do you know about the item of \$490.59?

A. I don't think I know what that was for.

Q. Give us the next items?

A. March 10, cash—this looks like C. B. Jones wages \$48.60; March 17, Ex. W. C. More, 562 3/4 hours, at \$2.25, \$126.62. I think that was for work More had been doing for me. April 7, expressage \$.75.

April 30, wages Harry Stichter, \$18.23; May 1, material, \$3.00; May 30, wages, Harry Stichter, \$14.55; June 5, cash, \$100.

Q. What was that for?

A. I don't know. I have simply cash on account.

Q. What are the next items?

A. June 27, cash, \$10; June 29, cash, \$15; June 30, wages Jones,

\$5.10; July 9, cash, \$150; July 30, cash \$60; July 31, wages Jones \$71.70.

Q. What were those items for?

A. Cash on account. I had to have something to live on.

Q. What are the next items?

A. August 6, cash, \$10; August 19, cash, \$50; August 7, cash, \$50; August 31, cash, \$31.15.

Q. That is Jones in the book?

A. It is not so shown here. That is right. I found it in Cunningham's account.

Q. What are the next items?

A. September 8, cash, \$100; September 10, cash, \$9; September 10, cash, \$20; September 19, cash, \$20; October 31, cash \$25.

Q. Have you any recollection of these, as to the character of what it was for?

A. No, sir, cash on account.

Q. What are the next items?

A. October 31, cash Jones, \$14.55; November 19, cash, 103 \$100; November 30, cash, \$25; December 17, cash, \$200. 1904, February 9, cash, \$100; February 29, cash, \$50; March 21, cash, \$75; April 16, cash, \$40; April 13, cash, \$25; April 21, cash, \$200; April 26, cash, \$100; May 14, cash, \$100; May 21, cash, \$10; May 24, cash, \$100; June 24, cash, \$100; July 19, cash, \$100; August 15, cash, \$9; August 8, cash, \$100; August 23, cash, \$100; September 1, cash, \$100; September 24, cash to pay Hunter loan, \$4; September 26, cash, \$100; October 31, material, \$2.50; November 2, cash, \$8.75; November 10, material, \$1.40; November 11, cash, \$2; November 14, cash, \$200; November 30, cash, \$5; November 21, cash, \$50; November 30, cash, \$100; November 30, cash, Motor to Cadell, \$82.50. 1905, January 5, cash, \$5; January 7, cash, \$100; January 25, cash, \$25; January 28, cash, Fletcher, \$50.

January 31, cash, \$200; January 31, material, \$1; February 28, cash, \$250; March 21, cash, \$100; March 31, \$50; April 27, cash, \$100; April 30, expenses, \$3.52; May 10, cash, \$200; May 23, cash, \$150; June 12, cash, \$20; June 22, cash, \$100; July 1, cash, \$5; July 18, cash, \$150; August 7, cash, \$100; August 8, cash \$100; August 24, cash, \$150; August 31, material, \$3; September 11, cash, \$150; October 7, cash, \$10; October 17, cash, \$1.50; November 11, cash, \$150; November 29, cash, \$3.76; December 16, cash, \$5; December 30, cash, \$50. 1906, January 9, cash, \$15; January 15, cash, \$10; January 15, cash, \$100; January 24, cash \$60; January 27, cash, \$75; January 31, Trade Advertising and Publishing Co., \$0.50.

February 13, cash, \$50; February 23, cash, \$100; April 2, cash, \$150; April 3, cash, the difference between \$18.75 and \$19.37, which is \$0.60; April 14, cash, \$20; April 19, cash, \$100; April 16, cash, \$400; April 25, cash, Biehl note, \$500.

Q. What do you mean by the Biehl note?

A. This was a note of the Duryea Power Company's in the hands of Biehl which was paid by me. I got the Five Hundred Dollars to pay it. It was one of the things that balanced and ought not to be in the account.

Q. What are the next items?

A. April 27, cash, \$50; April 27, cash—I had in the body of the paper, \$70.75—but in the claim it is \$16.75, and a question mark after it. I don't remember making the entry, but that is the way the entry stands here. April 27, cash, \$4; April 28, cash, \$1280.00.

Q. Was that a note?

A. I don't know. I have nothing to indicate.

Q. What are the next items?

A. April 30, cash, \$53.43; April 18, cash, E. & C., \$120. I think that is Ellis & Cummings.

April 28, cash, \$1.50; May 5, cash, \$300; May 8, cash, 104 Sturgess, \$23.25; May 16, cash, \$10; May 21, cash, \$300;

June 1, cash, \$5; June 1, Sundry checks, \$93.88; June 7, cash, \$58.18; June 16, cash, \$57.46.

June 12, cash, \$27.52; June 13, cash, \$20.46; June 18, cash, \$14.60; June 20, cash, \$26.70; June 22, cash, \$14.00; July 2, cash, \$200; July 24, material, \$.25; July 26, cash, \$12; August 8, cash, \$100; August 28, cash, \$50; August 31, material, \$2.84; September 7, cash, \$40; September 26, material, \$.51; September 29, material, \$2.80; October 31, material, \$1.49; October 3, cash, \$37.65.

October 9, cash, \$20; October 16, material, \$1; October 29, cash H. M. Sternbergh, \$250; November 12, cash, H. M. Sternbergh, \$125; November 12, cash H. M. Sternbergh, \$125; November 14, cash, \$200; November 16, cash, \$50; November 26, material, \$.28; December 17, Busby C. O. D., \$31.05; December 1, cash, \$125; December 17, cash, \$93.95. Making a total of \$26,742.44.

Q. Now we will go over the credit items; what is the first?

A. 1900, March, Motor No. 1, \$250.

Q. What was that?

A. One of the motors I shipped from Peoria, Illinois. It was put into our first vehicle.

Q. Is that one of the items for which you got Thirty Thousand Dollars worth of stock?

A. No, sir.

Q. What is the next item?

A. June 21, 1900, Company Stock book paid for by Duryea, \$5.50. The Company had failed to give me credit for that, but they got the stock book.

Q. What is the next item?

A. July 2, Motor billed June 11, \$250; November 5, Holyoke trip, \$28.35; December 8, Lazelle for Photos in History Leaflet, \$3; August 15, delivery wagon, \$1000; August 15, \$5.

Q. What was that for?

A. I don't know what. There is no other item given in that.

Q. What is the next item?

A. October 31, Motor, \$250.

Q. What arrangements did you have with the Company for the furnishing of these motors or for the payments?

A. There was no particular arrangements. One of the first things we did was to get vehicles started, and I supplied the motors from

the Duryea Manufacturing Company of Peoria. One was shipped in March, one in October and one in July.

Q. Was anything said to the company of the arrangements looking to the payment or fixing of prices?

105 A. The price was \$250 and the first two were paid *paid*. I don't know whether the third was paid for or not. You will find on April 19, cash, Motor No. 1, \$200. In the third item, July 2, motor bill June 11. You will find that on both sides of the account.

Q. The first motor appearing on the books is July 2. The item of April 19, with which you have credited yourself, appears on the books as a cash item on the note of \$250?

Q. Do I understand you to say that is original entry?

Q. The original entry is April 19, 1900, see 5, \$250.

Mr. WAGNER: I would like to vote my claims.

Mr. DEYSHED: I object to the voting of any claims until we are through with the examination.

REFEREE: You can put down as many claims as you have here if you know the amounts.

Mr. DEYSHER: I want to object to that and examine Mr. Duryea on some letters that have been sent out and attack the powers of Attorney.

Mr. WAGNER: Then I will have to do the same thing.

Adjourned to Saturday, June 22, at 10.30 o'clock, A. M.

Adjourned first meeting, Saturday, June 22, 1907, at 10.30 A. M.

CHARLES E. DURYEA, P-call-d.

By Mr. DEYSHER:

Q. What discovery have you made as to that one motor?

A. That was the third item of July 2, motor bill June 11, \$250, or is it October 31st item.

Q. The books credit you with two and you claim three, which ones do you claim.

A. My understanding of the motors is that the first motor was delivered and paid for in March or April and the second motor delivered on or about June 11 and the third motor was delivered in the fall.

By Mr. WAGNER:

Q. You supplied these three motors?

A. They came from the Duryea Manufacturing Co., at Peoria, Illinois, under my instructions to be shipped to the Duryea Power Company.

By Mr. DEYSHER:

106 Q. According to the account in the books the first motor was paid July and the second on October 31, and there is no record of any receipt of the third motor?

A. I think the reason is because the first motor reached the com-



pany before it was incorporated and the record you have is the record of the two last motors. I think the first motor was paid for on April 19, and was \$250.

By Mr. WAGNER:

Q. Did you charge yourself with that?

A. Yes, sir.

By Mr. DEYSHER:

Q. Give us any testimony you can on the subject of the three motors?

A. The only testimony I can give is such record as I have already submitted in my account, and the fact that we began work on our first vehicle after the preliminary agreement of February 13. I sent on one man by the name of Davis from Peoria, Illinois, about the 28th of February and we had two or three men going on that work the first three days of March, and I think this motor was shipped from Peoria during March. The first motor went into our vehicle which was finished in July, and the second motor was shipped about June. The third motor we have a credit for as shown by the Company's books in October and was therefore shipped in the fall.

By Mr. WAGNER:

Q. You are positive there were three delivered to the Company?

A. A thing seven years ago being a matter of memory, I cannot be absolutely sure. We built two vehicles that summer and no Duryea Power Company's motors were used at that time.

By Mr. DEYSHER:

Q. How many motors do you say you furnished to the Company for which you should have been paid?

A. Three.

Q. For how many were you paid?

A. Only two as shown by this account.

Q. Holyoke trip, \$28.35, what is your recollection about that?

A. In my little memorandum book, I find on the dates of October 14 and October 21, inclusive, expenditures covering a trip to Holyoke, and while the total does not appear in that book, I believe it will be found to total up the same as November 25, \$28.35.

Q. Lazelle for Photos in History leaflet?

A. December 8, check, \$3.00.

Q. Three dollars charge Lazelle for photos, check dated May 2, 1902, is produced.

107 A. In the item of \$3 and the item of \$4.50 the dates are wrong.

Q. The delivery wagon of August 15, \$1000, charge of \$5 on the same date, and the motor of October 31st, all appear in the account on the Company's books?

A. Yes, sir.

Q. The next item, initiation fee N. A. A. M. February 20, \$25.00?

A. This was paid at the formation of the National Association of automobile companies of which the company was a member for

several years or until the company was incorporated in which case it became necessary for an individual to represent the company and this is the check.

Q. Lazelle Photos, \$4.50, May 2?

A. On December 8, 1902, I find an entry on my diary, photos, \$4.50, showing items for which they were paid.

Q. Did you pay that amount?

A. Yes, sir, to Lazelle for the photos and delivered the photos to the Duryea Power Company.

Q. June 4, Lauther, Expenses, \$15?

A. This check is the check with which I paid that item.

Q. June 4, envelopes?

A. Here is the check for \$21.40, which I gave to A. M. High.

Q. June 11, Dailey, \$3.13?

A. Here is the check for that.

Q. Garside, \$25, June 22?

A. That appears as cash charged to me, but not credited. Here is the check which I used to get the cash which I gave to Garside. The check is endorsed by W. F. Garside.

Q. September 8, advertising, \$40?

A. It is my belief that item which I think was shown in the Cunningham account as a charge against me was an error and should be a credit for me the same as the item of \$30 for advertising below. I don't believe the Company ever paid any advertising for me and I did pay advertising for the Company.

By Mr. WAGNER:

Q. The books here show that it was first a credit to you and then subsequently turned over and made a debit?

A. I think the turning over was an error. They didn't turn the next item under it over. I was writing for both these papers and getting pay for my writing and undoubtedly a credit stood to my account.

108 By Mr. DEYSHER:

Q. This would look as if that item had originally been entered as a credit?

A. Yes, sir.

Q. Then it was stricken out with red ink and transferred to the debit column?

A. The other items were on the wrong side and that item was transferred with the other items in error. I should have said the other items were transferred to correct the error. This item, although first entered on the right side was wrongly transferred. There was only one item I believe to be wrong. I have no recollection of it except I know I paid for advertising for the company which they should have given me credit for.

Q. Did you pay for advertising to the Trade Advertising Company?

A. I wrote to the Cycle Trade Journal and to the Horseless Age. I paid for advertising to both.

Q. September 30, D. P. Co., N. Y. trip?

A. I have a check stub for that, dated September 30, 1902, D. P. Co., N. Y. trip, \$10.

Q. Chicago show, 1902, and N. Y. Bill, \$76.16?

A. I have various items such as to Chicago, March 1, 1902, and in May to N. Y. \$6.24, Providence, &c., which I believe make up that charge.

Q. You make that item up from the various expenditures you find in your diary?

A. Yes, sir.

Q. The next two items, December 31, \$339.04; December 1, Horseless Age, advertising, \$30; January 24, 1903, Dailey for New York show, \$15, all appear in the record made up from the books?

A. Yes, sir.

Q. N. Y. Show expenses, \$70.55?

A. Various items in my books on several pages foot up as \$70.55, in my diary.

Q. That amount was expended by you for the company and not repaid to you at any time?

A. It was expended by me for the company but I have no record of payment balancing it, therefore I have included it in my list of credits and if there was a payment to balance it, it would be found in the debits.

Q. Next item, February 28, Jones to Hartford is found in the books?

109 A. Yes, sir.

Q. The next three items, February 24, H. A. Hoyt, \$169.24; April 3, Wages D. P. Co., \$24.58; June 5, Finance & Industry Advertising, \$9.

A. I offered three checks for those amounts. They are my checks paid for the benefit of the company.

Q. \$17.94, \$103.50 appear on the company's books. What evidence do you have for the payment of the next charge, Chicago show, 1903 \$65.80?

A. On several days, from February 12 to the 26th, I have various items which foot up as \$65.80. That money was expended for the benefit of the company.

Q. \$15.90; \$2.00; \$10; \$5; \$110.37, all appear on the Company's books?

A. Yes, sir.

Q. Chicago show, 1904 \$38.50?

A. The items are included in February, 1907, 7 to 13 inclusive, and total \$38.50.

Q. Were these entries made at or about that time and are for moneys that were paid out by you for the benefit of the Company?

A. Yes, sir.

Q. Worcester trip, \$16.05. March 19, 1903?

A. In my diary I find a mention of that trip but I don't find the amount, so I have not been able to see where I got the exact figures.

Q. New York trip, \$14.04?

A. On February 19, I find that item of \$14.04 for expenses incurred for the company.

Q. Baltimore trip, \$7.04?

A. On March 7 and 8, I find that trip, \$7.04.

Q. June, St. Louis Exhibit, \$52.45?

A. On May 31 to June 4, I find the items of that trip, a total of \$52.45, and is marked bill which means I rendered a bill to the company for so much money expended for the benefit of the company, and the entries were made at that time. That was the St. Louis exhibit.

Q. Easton, five trips to sell auto, \$15?

A. August 31, I have a memorandum in my book giving the expenses of one trip and stating that I sold auto, five trips. There is not total amount given to this item but assuming each trip at \$3, that would make \$15.

Q. August 9, Dailey to Boliver D. P. Co., \$10; October 4, General Expenses, \$20; October 4, Heydt to Columbus, \$40?

110 A. I have three checks covering these items. Here is the check for H. C. Dailey endorsed by him. That item of October 4, Heydt to Columbus, \$40, is an error. The check for general expenses is October 11 instead of October 4.

Q. Loaned Hunter, \$4, appears on the books of the Company. October 11, Phila. & Easton, \$4.01, what is that?

A. I find that in my diary as bill. Here are the items to Phila. & Easton. Two different trips, but the total is not given.

Q. The October 20, cash \$40, Heydt, appears on the books?

A. Yes, and this is the check for that.

Q. November 5, cash Wood, \$400; November 9, cash, \$1.00; November 26, cash \$48.25; November 26, cash, \$10; November 30, mixers, \$15.62; all appear on the books of the company?

A. Yes, sir.

By Mr. BERTOLET:

Q. Here is an item of \$200 which you have omitted?

A. That item appear- at the end of the list but was put in there and I have letters in support of that item.

Q. Account Brass Co., R. V. Co. deposit forwarders?

A. That amount was paid to the Rapid Vehicle Company in which I was interested which they did not take. That Two Hundred Dollars was assigned to me and I sent the assignment on to the Account Brass Company, so I do not have that assignment. These two small checks were payments I made to the Brass Company which the Duryea Power Company got from them. So the Two Hundred Dollars should be credited to me as I saved the Duryea Power Company that money. It was paid for the Duryea Power Company by those people assigned their credit to me.

Q. You turned them into the Power Company but they never paid the money?

A. Not that \$200. You will find the Duryea Power Company paid directly to the Account Brass Company one or two purchases of mixers.

By Mr. DEYSHER:

Q. How much did you pay of this claim for these mixers?

A. This Two Hundred Dollars was my payment having been made by the Rapid Vehicle Company of New York and assigned to me. I also paid \$15.62 as shown by this check of December 23.

Q. For that you did have credit?

A. I also paid \$16.88 on February 3 as shown by this check. There is an error of \$15.62 against me.

111 Q. These two items of \$15.62 and \$16.88 were paid but you are entitled to a credit of \$200 on this transaction?

A. Because the Rapid Vehicle Company of which I was a member, had paid the Account Brass Co. for these same mixers to the amount of \$200, and that account had been assigned to me. Therefore it belonged to me and these mixers were purchased by the Duryea Power Company of the Account Brass Co?

Q. And on that purchase the Duryea Power Company got credit for the \$200 paid by the Rapid Vehicle Co.?

A. They and I purchased the mixers by paying the remainder so we got a credit of the Duryea Power Co. My checks show what I paid and the other checks show what they paid and this \$200 they didn't pay but they got the credit.

By the REFEREE:

Q. They paid \$200 less on account of your assignment?

A. Yes, sir.

By Mr. DEYSHER:

Q. The payments were made by the Rapid Vehicle Co. July 10, 1903, and the other September 12, 1903. These goods, however, were returned by the Rapid Vehicle Co. to the Account Brass Co.?

A. They never passed into the hands of the Rapid Vehicle Co. They were in the hands of the Account Brass Co. I got the assignment of this \$200 of Nov. 30.

Q. Who is the Rapid Vehicle Co.?

A. Francis B. Carly was the President.

Q. Is it a corporation?

A. A corporation of New York city. There was one hundred and twenty-five mixers and they were from \$2 to \$2.50 a piece, the original price.

Q. Did you pay the money?

A. The Account Brass Company got the money and the Duryea Power Company got the mixers.

Q. That was paid by somebody else but the Duryea Power Company didn't pay the full amount of that and neither did you individually?

By the REFEREE:

Q. What was it worth?

A. We started to form an Automobile Company over there. I put in the patent rights and when the company failed, they said we cannot give you back your rights. We cannot break up the company and we will assign to you such assets as we have, and these mixers were part of this asset.

## 112 By Mr. DEYSHER:

Q. The books of the company only show three transactions with the Account Brass Manufacturing Company?

A. I testified before that the company did make some payments to the Brass Company directly.

Q. Did you pay anything for that assignment?

A. I did.

Q. How much?

Mr. WAGNER: I object to this repetition of the matter.

A. I cannot measure the value in dollars and cents. There was no cash but I considered the rights worth more than \$200.

Q. December 7, Carly settlement? \$230?

A. Here is the check.

Q. Two New York trips, \$14?

A. These trips were for the purpose of effecting that Carly settlement. I have a record of one as being December 7th. I have no record of when I made the other.

Q. December 10, Phila. & Easton, \$4.57?

A. I have two trips on the 10th and 12th in my diary amounting to 4.57.

Q. December to February, Mixers, \$32.50?

A. That is one of the items of which I have been talking, of which there is one check there.

Q. That item of \$32.50 should be \$16.88?

A. I think that is correct.

Q. January 31, N. Y. Show, \$89.15, appears on the books. Chicago Show, 1905, \$126.70?

A. On February 12, in my diary I have an entry extending from the week preceding. I was there one week. The show lasted from Saturday night till Saturday night. We generally had two or three people with us.

## By the REFEREE:

Q. You paid their expenses?

A. Sometimes I did and sometimes I did not. That money was paid for either the two of these people or four of them.

## By Mr. DEYSHER:

Q. January 25, Fletcher, show expenses charged but not credited, \$50?

A. They charged me with that money which I paid Fletcher but they didn't credit me with the half I paid Fletcher. I have a check for \$25.

113 Q. April 24, N. Y. Show trip, \$9.49?

A. This is not totalled but it is marked bill for the A. T. Co. That appears in the diary.

Q. May 24, Newark trip, \$6.54?

A. That is in my diary.

Q. \$1.50 appears on the books and does also \$109.44. August 8, Lauther, \$10?

A. Check endorsed by Lauther.

Q. August 9, N. Y. Aldrich deal, \$8.60?

A. That was on the Aldrich loan of Ten Thousand Dollars to the company. In my diary that was the early part of August.

Q. Bangor, \$8.20?

A. That should be in October instead of August 23rd and 26th of October. That appears in my diary.

Q. August 19, Fletcher, \$10?

A. Here is the check.

Q. October 19, cash, \$40; October 31, cash, \$200; October 20, cash \$1.00, all appear on the books. Insurance Aldrich, \$25?

A. In order to complete the Aldrich loan, I had to take out an accident insurance on myself and this is the premium, \$25. I also endorsed the paper and made myself personally liable and that is the check.

Q. November 8, Cushing, \$600?

A. Vehicle 1 Cushing, sent to the Duryea Power Co. to be sold by them. Here is the check. The Duryea Power Company didn't have the money and I paid for it.

Q. Nov. 11, cash \$2000 note, \$700?

A. That is credited on the books.

Q. As are also the items November 8, \$1.40; November 13, cash, \$36; November 29, \$0.50; December 23, \$3.00; December 26, \$.35; December 30, cash, \$20; September 9, B. H. McCray, \$87.31?

A. Check for that.

Q. November 22, cash, \$69.80?

A. Check to B. H. McGray.

Q. November 28, Lemont, \$200?

A. Check for that.

Q. December 23, Cailey, \$15?

A. Check for that.

Q. January 10, 1906, cash N. A. A. M., \$10?

114 A. Check to William R. Innes, Treas. of N. A. A. M. I think at that time it was still in the Company's name but I paid it.

Q. On January 12, \$1.25; January 20, \$1.17; February 15, \$30, appear on the books. March 2, cash Dailey, \$28?

A. I have a check for that.

Q. April 2, cash, \$1.20 appears on the books. April 12, cash Heim, \$10; E. & C., \$100; Stamps, \$10, a total of \$120?

A. I have checks for those items.

Q. April 13, cash, \$56.89?

A. I have been unable to find that but find an account further down, April 13, \$56.89. I think this account is a duplication.

Q. May 1, First National Bank, \$300?

A. I have a check for that.

Q. What was that for?

A. I have here on my record a charge but not credited. That was money advanced to the Duryea Power Company but they didn't credit it.

Q. A. C. A. \$10, May 1?

A. Fee for endurance run. Check.

Q. May 1, cash M. Rowe, \$10?

A. Check for that.

Q. May 28, Goodyear Co., \$390.51?

A. Check for that.

Q. The next items of May 31, \$326.11; April 2, \$1.25; April 14, \$10; April 16, \$306.50; April 16, \$52.94; April 19, \$89.40; April 20, \$50.92; April 20, \$5; April 27, \$500; April 27, \$43.10; April 27, \$32.87; April 29, \$205; April 29, \$30; April 29, 135.54; April 29, \$295.42; April 30, \$16.10; April 13, \$56.89; April 13, \$1.20; May 1, \$100 to the Excelsior Brass Co.; May 1, \$100 to C. C. Knight, appearing as \$200 on the books of the company, all are items that appear on the books of the company?

A. I think so.

Q. May 2, \$20?

A. I have not been able to find substantiation of that. It may possibly be the two items of May 1 above for which I submitted check of Rowe and A. C. A. It may be an error.

Q. May 7, Noble, \$10; May 9, each, Dailey, \$20; May 17, \$5; May 17, \$0.30; May 21, \$20; May 24, \$2.85; May 28, \$0.50; these all appear on the books of the company?

A. I believe so.

Q. May 29, stamps, \$50?

115 A. I have no record to-day to substantiate that? It was probably paid out in cash.

Q. May 29, Heim, \$10?

A. I could not find the \$10, but the fifty cents you have on the books.

Q. June 1, \$0.30; June 6, \$48.80; June 6, \$100; June 7, \$2, June 7, \$7.16; June 7, \$27.25; June 7, \$12.60; all appear on the books of the Company?

A. I believe so.

Q. June 9, cash Berks Light and Teat Co., \$18.75?

A. Check for that.

Q. June 29, Rushmore, \$43.90?

A. Check.

Q. June 18, M. Roe to Boston, \$10?

A. Check.

Q. June 19, \$3; June 21, Knight, \$76.54; June 22, Sundry checks, cash debit, \$1079.48; June 22, \$194.75, all appear on the books?

A. Yes, sir.

Q. June 19, cash Dailey, \$15?

A. I have a check for that.

Q. June 22, Bowers, \$23.18?

A. The check was drawn for \$25 in cash. The stub shows cash as D. P. Co., Bowers, \$23.18. I drew the cash myself and kept the remainder.

Q. June 26, Dailey, appears on the books; Duryea Manufacturing Co. account, p. 62, \$47.48. That is the difference as appears on the



books of the company between the debit and the credit columns of the Duryea Manufacturing Company?

A. I understand it to be so.

Q. That is a charge against the Duryea Manufacturing Company?

A. Against the Duryea Power Company in favor of the Duryea Manufacturing Company. Since the two accounts were merged, I merged that in this account. I am in this account representing the Duryea Manufacturing Company and the two accounts have been kept together.

Q. Is the Duryea Manufacturing Company still in business?

A. They gradually quit business. They were out of business by the close of 1900 or 1901.

Q. Was that a partnership?

A. A corporation.

116 Q. You were interested?

A. I held some of the stock.

Q. By what right do you transfer this item to yourself?

A. By the simple right that payments that should have gone to the Duryea Manufacturing Company were in many cases paid to me and charged to me, and the bookkeeper of the Duryea Power Company merged us together and I merged them together through this account.

Q. March salary, \$250, does not appear on the books of the company, and you say you were paid salary for March, 1900, and charged it?

A. If you will refer to the check stub of the Duryea Power Company, you will find that on April 23, I was paid \$235 on account of March salary. The balance was little expenses but I gave them credit for \$250.

Q. Salary from April 1, 1900, to January 1, 1907, \$250 a month?

A. Yes, sir, \$20,250.00.

Q. Cash and notes as per contract \$10,000. Of that amount you held three notes of Two Thousand Dollars each?

A. I have presented as part of this claim three notes originally \$2000 each, on one of which \$150 has been paid.

Q. And interest on the notes?

A. It is from the date of their maturity.

Q. Who had charge of the books of the company and who was operating the plant for three or four years?

A. In the beginning it was understood that the four parties to the contract were to be active, but Mr. Crowther was to be the general sales manager.

Q. Take from 1902 or beginning with 1903 until the latter part of 1905 or early in 1906, who was running the business?

A. I don't think it is possible to give a fair answer to that question without completing my answer which I first begun. Mr. Millholland was to take charge of the office until such time as Mr. Sternbergh could make himself active in connection with the business. I was to look after the starting of this new work and didn't think at first that I would be required more than six months in a year, and therefore I did not move my family to Reading for quite a while.

Mr. Millholland took charge of the office and remained in charge until about November, 1900. After some delay Mr. Sternbergh engaged a young man by the name of Reeser and he remained in charge of the books and of the office for I should think eighteen months. Probably until the winter of 1902 and '03. After several complaints to Mr. Sternbergh about Mr. Reeser's unsatisfactory work in charge of the office and the books, he was discharged and

117 Mr. W. C. Hohl was engaged at a salary of about \$7.50 per week, and he had charge of the books until about March of 1906, when having made a contract with S. N. Heim as Manager of the Company, Mr. Ribble was hired and had charge of the books until some time last winter. Under Mr. Hohl as the office duties grew too large for him to look after the pay roll, the purchase of material and similar work, two young ladies were one at a time taking care of the books, a Miss Bates for perhaps a year, and another whose name I have forgotten after Miss Bates for a few months.

Mr. WAGNER: What is the purpose of this?

Mr. DEYSHER: I want to find out what time he was managing the plant.

A. The interest of Mr. Sternbergh lagged perceptibly so that whereas he visited the plant nearly every evening for an hour during the first summer, his visits became less frequent and consequently all the responsibility fell upon me. Mr. Sternbergh taking occasion however contrary to my advice and wishes—

Q. When did you have charge?

A. I didn't have absolute charge or full charge although a good part of the time I was permitted to conduct that business.

Q. What time was that?

A. There was no definite period. After Mr. Millholland left the business was more in my hands than before. After Mr. Reeser left it was still more in my hands.

Q. When was it entirely in your hands?

A. I don't think it was ever in my hands. Mr. Sternbergh was recognized as being a heavy stockholder and I tried to carry out his wishes unless I saw he was wrong.

Q. For how long a period did Mr. Sternbergh absent himself from the plant?

A. I think for the last two years a period of six months may have gone by without him being at the plant.

Q. During that time he did not take any interest in the matter except such financial assistance as you required?

A. During that time Hohl and myself kept in touch by seeing him either in the country or at his home in the city.

Q. He didn't come to the plant for two years?

A. During that period there was a time as long as six months that he was not there at all. He signed all the checks and was kept in as close touch as he seemingly cared or was willing to give us time to inform him.

Mr. WAGNER: I ask that the claim be amended by this  
118 extra bill of November 3, 1905, of \$20 paid by the claimant to H. C. Dailey for the benefit of the company by check, which was omitted.

We will not ask the Referee for a finding. The following sums are to be eliminated as having been error: \$40, \$15.62, \$56.89, \$20 and \$20.

WELLINGTON BERTOLET, Esq.: I ask that May 20, 1906, \$10, be stricken out.

Mr. WAGNER: I would ask that the Duryea claim be allowed unless specific objection be stated.

Mr. DEYSHER: I propose further to interrogate the witness as to the writing of letters by both himself and Mr. Wagner to creditors, for the purpose of obtaining proxies and showing that these proxies cannot be voted.

Mr. WAGNER: At the same time I desire to give notice that I will file exceptions in behalf of Roger C. Aldrich and the Excelsior Brass Works to the appointment of the Pennsylvania Trust Company as Trustee for the reasons stated therein. I would also file exceptions in behalf of the same parties to the voting by Mr. Deysher on account of letters he has written.

I also file exceptions to the voting by Mr. H. M. Sternbergh if any proxies he may have by reason of the fact that the claimant paid for a lien on a large part of the assets of this Company for loans alleged to have been made to the Company and also by reason of letters he may have sent out to the creditors.

I desire to have at that meeting Mr. H. M. Sternbergh and also Mr. Hagy, who is head of the Pennsylvania Trust Co., Receiver.

Adjourned to Monday, May 24, 1907, at 11 o'clock, A. M.

Adjourned first meeting at the office of the Referee, on Monday, June 24, 1907, at 11 o'clock, A. M.

Mr. DEYSHER: I wish to file the following claims. No Powers of Attorney for these:

East Side Auto Station.....	\$22.85
Beckwith Chandler Co.....	35.25

Mr. WAGNER: I have Power of Attorney for the last.

I offer proofs of claim of the following:

Penn Spring Works.....	\$715.59
Light Mfgr. & Foundry Co.....	45.50

REFeree: Penn Spring Works was filed. Power of Attorney to H. M. Sternbergh, dated April 5, 1907.

119 Mr. DEYSHER: I offer proof of claim of the following with Power of Attorney to me:

R. D. Mutall & Co.....	\$286.00
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D. E. SCHROEDER: I offer proof of claim of the following with Power of Attorney to me:

Daniel Madlem.....	\$52.20
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Additional appearances, D. E. Schroeder, Esq.

CHARLES E. DURYEA, Recalled.

By Mr. DEYSHER:

Q. When was this Company, the Duryea Power Company, incorporated?

A. About April 6, 1900.

Q. When was the capital stock increased?

A. April 20.

Q. On April 20, 1900, the capital stock was increased from One Thousand to One Hundred Thousand Dollars?

A. That is as the records show. I don't remember the date of April 20.

Q. What property was contributed by you and by the other members of the company to make up the capital stock?

A. Mr. Sternbergh contributed twenty-five thousand dollars in Cash. I was to receive out of a total capitalization thirty thousand dollars in stock.

Q. What was contributed by the various members?

A. I contributed the rights to use such patent features as were embodied in the vehicles to be constructed, and also the use of certain patterns, drawings and things of that kind necessary to help along the work. That is the only property I know of.

Q. Do you have these assignments of patents or whatever papers were executed by you to the Duryea Power Company?

A. The papers were drawn up by Mr. Heister and the matter was left in his hands. This is the paper I have regarded as the assignment. (Indicating).

Q. Were any patents granted to you after this agreement was executed?

A. Yes, sir.

Q. What papers were executed giving to the Duryea Power Company the right to use these patents?

120 A. I don't think any papers were executed. I understood this original agreement conveyed that right.

Q. All the other patents have been issued to you since June 11, 1900, before the execution of these licenses?

A. I don't remember the full number. There was a patent on a mixer, January 1, 1901, and on two other devices issued in our rigs in the early part of 1903.

Q. They were granted to you in your name, the three patents you just mentioned?

A. I think they were. I am not sure.

Q. There has been no assignment of licenses or any other paper executed giving to the Duryea Power Company the right to use these patents since their execution?

A. I don't remember.

Q. What was the property worth which you transferred to the Duryea Power Company?

Mr. WAGNER: We object to that. What is the purpose?

Mr. DEYSHER: For the purpose of showing that the amount contributed by the witness was not seventy-five thousand dollars.

Mr. WAGNER: We object to that.

REFEREE: You are entitled to see what it was worth in order to show whether he owes anything to this company. You want to show whether he put into this corporation for which he got three hundred shares of stock enough property of any kind to make it worth seventy-five thousand dollars.

Mr. WAGNER: I object. They came to a fair understanding among themselves that this was worth thirty thousand dollars, that is, the amount of the value of stock issued to him together with the notes of ten thousand dollars, or forty thousand dollars.

Mr. DEYSHER: I object to this kind of an objection. It is not intended in good faith. You ruled this testimony was competent and he knows it is competent.

REFEREE: What they considered it worth at the time, that is the question. They got together and agreed that Duryea should contribute to this company certain property at a certain price. It does not matter whether the property was and actually is worth that much. It really does not matter altogether what it was worth in dollars and cents, but it is a question of what they believed it to be worth when they made their agreement.

Q. (Question repeated.) What was the property worth which you transferred to the Duryea Power Company?

A. I considered it worth the amount I received, ten thousand dollars in cash and notes and thirty thousand dollars in stock.

121 Q. You considered it worth that and only that?

A. I cannot say I considered it worth only that. I had been negotiating with other people for a higher price and failed, and I felt it was worth that much and accepted that.

Q. You considered it worth more than that?

Mr. WAGNER: That is where I object. They want to show that this man considered this property to be worth seventy-five thousand dollars for the purpose of showing at the time that they issued this stock, that the stock was full paid. We must take not what they considered a particular property to have been worth but what they among themselves agreed and they can not testify here that it was worth more than that when it was paid into the company merely for forty thousand dollars.

REFEREE: Whatever they agreed among themselves the property was worth is all we have to inquire into. For the purpose of this inquiry you can ask what they considered it worth among themselves.

Mr. DEYSHER: You ruled the other day what was actually done and what was actually considered in this matter. I want to know just what the property was worth so far as creditors are concerned. That may or may not establish the value.

Mr. WAGNER: It binds not only the company but the creditors in a matter of this sort.

Mr. DEYSHER: I insist I have a right to know the value of that property, not only what was agreed upon by the incorporators, but its actual value.

REFEREE: By that agreement they agreed to contribute to the

Duryea Power Company, not to themselves. If he agreed to put it in at forty thousand dollars, it does not affect that. That agreement bound them to contribute certain things to the Duryea Power Company. They had no property to give unless they gave actual cash under the subsequent agreement, because the subsequent agreement mentioned nothing but what they supposed had passed by these agreements. In the Sternbergh agreement twenty-five thousand dollars is mentioned, and what they supposed had passed by this agreement. I hold that that agreement passed nothing to them individually. It passed to the Duryea Power Company and it does not matter whether the stuff he put in was one hundred thousand dollars or not, if he had a claim for nineteen or twenty thousand dollars, but if he would owe watered stock to the company, you have a right to show it. If my construction is wrong it is another matter, but I find from that agreement that those men agreed to turn over to the Duryea Power Company and not to themselves certain property. I don't think they ever gave anything excepting what cash they paid. You see here we are examining Duryea's claim

122 and our evidence must be confined to that. He has proven his claim *prima facie*, and there have been few, if any, objections made to the items of his claim. The tendency of this question must be to show a set-off against his claim, and further than that I don't think they can be allowed to go. You must put some limit to this examination.

MR. DEYSHER: There is no limit to an examination which affects the value of the property which he contributes.

REFEREE: He says it was considered worth forty thousand dollars, fully worth what he got for it in stock.

MR. DEYSHER: Do you mean to rule that I am bound by that answer.

REFEREE: I think that ends the inquiry. If you intend to go back to the agreement, you can show that it was not worth forty thousand dollars. I have ruled out any question that may ask him whether it was worth one hundred thousand dollars or something of that kind.

By MR. DEYSHER:

Q. What was the actual value of the property which you transferred to the Duryea Power Company?

A. I considered it worth forty thousand dollars, what I got for it.

Q. You considered it worth neither more nor less than that?

MR. WAGNER: I object to that as immaterial, irrelevant and incompetent.

REFEREE: The question is what it was worth in the market and he closed for forty thousand dollars. I think that fixes the price.

MR. WAGNER: My objection to that answer is this, that it is not a question of whether he considered it worth more. That is entirely immaterial and irrelevant. That part of the question as to whether he considered it worth more than what he actually got for it at the time of the agreement of the other incorporators of the Duryea Power Company.

Mr. DEYSHER: I don't consider him absolved by the contribution of forty thousand dollars. In my opinion unless that stock was worth seventy-five thousand he is liable. On the other hand because that is what he was to contribute and the other man was to make up the twenty-five thousand dollars.

REFEREE: That does not enter into it, what you consider he was liable to put into this company. I have already ruled that in my opinion they agreed to put in certain property, Duryea to put in these patents for which he was to get ten thousand dollars in cash and three hundred shares or thirty thousand dollars, viz: Forty thousand dollars. My opinion is that fixes what the property was worth.

That was their agreement as to the value of his property. In 123 other words it was agreed his property was worth forty thousand dollars and he should put that in in order to get his share of stock.

Mr. DEYSHER: In a prior agreement in regard to these persons it shows they later gave him three hundred shares and ten thousand dollars for his patents.

By Mr. DEYSHER:

Q. You considered this worth neither more nor less than forty thousand dollars?

Mr. WAGNER: I object to the question as to whether they were worth more as being entirely immaterial and irrelevant to the question at issue.

REFEREE: I don't think it is relevant to ask the question whether he considered them worth more. I sustain the objection.

Mr. DEYSHER: Note an exception.

Q. Did you at any time have an offer for this property or any of it, if so, what?

Mr. WAGNER: I object to that as being entirely immaterial and irrelevant.

REFEREE: Objection is sustained.

Mr. DEYSHER: Exception to that.

By Mr. KREMP:

Q. Had you offered it for sale to any one else, and if so, at what price?

REFEREE: Had you offered it for sale to any one else. Ask that question.

Q. Had you offered it for sale to any one else?

A. I had.

Q. At what figure?

A. One hundred thousand dollars in one case.

Q. What else?

A. I don't remember the other figure. It was something near that.

By Mr. DEYSHER:

Q. Was that a cash or stock transaction?



A. I think it was cash. I have forgotten the details.

Q. Did you have any offer for it?

Mr. WAGNER: I object to that as being entirely immaterial and irrelevant.

REFEREE: Objection sustained.

Q. Did you have any offer for this property at or about the time you entered into an agreement at or about February 13, 1900?

124 Mr. WAGNER: I object to that as being entirely immaterial and irrelevant.

REFEREE: We will answer that question.

A. At or about February 13, I didn't have any offer.

Q. How long prior to that date?

Mr. WAGNER: I object to that as being immaterial and irrelevant.

REFEREE: I consider that an immaterial question.

Q. You executed the agreement of 11th of June, 1900, and received three hundred shares of stock of the company, one thousand dollars in cash and nine thousand dollars in notes, did you not?

A. I executed the agreement and received stock at same date. I cannot say as to date, and also received cash and notes at some date to the amount of ten thousand dollars.

A. One thousand in cash and nine thousand dollars in notes?

A. I don't remember about the reception of the cash. I was under the impression it was eight thousand dollars in notes until I saw this additional note, so I guess that is right.

Q. Six thousand dollars of that ten thousand is still represented by the notes which you hold and which you made claim for, that is, \$58.50?

A. \$5,850, yes, sir.

Q. Did you or did you not at the time this company was forming, consider the property and cash contributed as worth one hundred thousand dollars, and if not, what amount did you consider the property and cash contributed worth?

Mr. WAGNER: I object. That question is entirely immaterial and irrelevant as bearing on the question at issue.

REFEREE: The issue here is the examination of the claim of Charles E. Duryea. All questions must be confined to that issue. I don't consider the question asked as pertinent to the issue. I think it may be a proper question to be asked at the time of the examination of the bankrupt and if asked it can be ruled on then.

Q. You were one of the judges of election held for the purpose of voting on the increase of the capital stock of this company, were you not?

A. Yes, sir, I was.

Q. You knew at that time the property which you were contributing and the cash which H. M. Sternbergh was contributing was forming the only capital of the Duryea Power Company?

Mr. WAGNER: I object. I ask what is the purpose of that ques-



tion. The agreement which they made at the time as to what shall be put to that capital of the company is perfectly valid. The agreement as to the incorporators is binding upon them. It only can be used to the advantage of the creditors. If the company becomes insolvent, then that can be used to the advantage of the creditors to the extent of any individual not having contributed to the full amount of the capital stock for which he was a subscriber or which he agreed to do.

REFEREE: I don't consider the question relevant to the issue, namely, the examination of the Duryea claim. I think it may be asked at the examination of the bankrupt and can then be ruled on.

Q. You are proving this claim principally for the purpose of voting for a Trustee and don't care what becomes of the claim after the Trustee is elected and have so said, have you not?

Mr. WAGNER: I object to that as immaterial and irrelevant. If he has a full bona fide claim, he has a right to prove it, and later if he feels like distributing the amount that he may get upon his claim in favor of the other claimants for the reason that he desires to see them fully paid, has no bearing on the question.

Mr. WAGNER: I object further that it makes no difference what his intention is. If you put this down as a matter of record, it is a question whether it won't be binding and for that reason I object.

REFEREE: That is a good objection. The question here is a bona fide one as a valid claim. It does not matter what he will do afterwards. You can ask if this is a bona fide claim.

By Mr. DEYSHER:

Q. You have said to creditors and to your attorney that you were pressing this claim principally for the purpose of voting it and that you didn't care whether you got the money out of it or not, that you would have been perfectly willing to have it distributed among the creditors for whom you got the proxies, or for which Mr. Wagner has proxies.

Mr. WAGNER: I object for the further reasons that we want the creditors mentioned.

REFEREE: Same ruling as before.

Mr. DEYSHER: This is offered for the purpose of showing that the claim is not presented in good faith or as an actual claim but simply for the purpose of controlling the election of the Trustee.

Q. You are interested as a prospective purchaser of the plant of the Duryea Power Company, are you not?

A. I think not. I have no money to purchase it.

Q. Have you not been entering into negotiations with people for the purpose of purchasing the property and having you run it under your patents?

126 A. I have been hunting for purchasers for the property but have not found any.

Q. You are not forming a corporation or association for the purpose of purchasing the property?

A. No, sir.

Q. You wrote a number of letters to creditors of the Duryea Power Company, did you not?

Mr. WAGNER: I object as to these letters. What is the purpose?

Mr. DEYSHER: If it is a question at any time it is a question now. That implies if this claim is proved, he would have a right to vote. Anything that would be done that would jeopardize his voting purpose is competent at this time.

Mr. WAGNER: A creditor may prove a claim and yet the claimant may put himself into such a position that he cannot vote. We object to that question as immaterial as bearing upon the relevancy of this claim.

REFEREE: It is a matter to be taken up when you come to the right to vote. The question cannot be asked.

Mr. DEYSHER: I wanted to go into the matter with Duryea because he said he was going to New York.

Mr. DEYSHER: I object to that as being irrelevant, incompetent and immaterial.

REFEREE: At present it is not relevant to this issue. It has not yet been offered for voting.

Mr. WAGNER: The assignment dated June 11, 1900, between Charles E. Duryea, of the City of Reading, and the Duryea Manufacturing Company, of Peoria, Illinois, and the Duryea Power Company, offered in evidence, and marked Exhibit "G" C. E. Y.

By Mr. DEYSHER:

Q. Where was this agreement?

A. This particular copy was one of several copies which was in the possession of the Duryea Manufacturing Company at Peoria.

Q. Were they executed in duplicate?

A. I think they were executed in quintuple, that is, five copies, four or five copies.

REFEREE: The Receivership appointed by the Court of Common Pleas brings in an offer from a certain Dr. Moss of Southport, Conn., an offer for machine 333, \$1000 cash, and asks permission of creditors assembled in meeting to accept the offer.

Mr. DEYSHER: I move that the offer be accepted.

Mr. WAGNER: I second the motion.

127 REFEREE: A motion having been made and all the creditors present having voted affirmatively, the motion was declared carried.

Adjourned to Monday, June 24, at 2.15 P. M.

Adjourned first meeting, Monday, June 24, 1907, at 2.15 P. M.

Mr. WAGNER: I offer proof of claim with Power of Attorney of Irvin Shanaman..... \$450.00

Also Power of Attorney in the claim of:

Robert De Hart..... \$127.69  
Filed by Mr. Montgomery.

Also file Power of Attorney of:

Beckwith Chandler & Co..... \$35.25

I ask for the allowance of the Duryea claim for the amount the Referee finds to be proved.

REFEREE: The claim is allowed, except for the amounts duplicated.

MR. DEYSHER: I object to the allowance of the claim as not having been sufficiently proved and because of the set off for indebtedness to the Duryea Power Company on stock subscription for stock issued to Mr. Charles E. Duryea.

REFEREE: I admit the claim.

MR. DEYSHER: To which we except.

I object to the Powers of Attorney and on that I want to examine Mr. Duryea, the Powers of Attorney filed by Mr. Wagner.

MR. WAGNER: I object for this reason that he must specifically state which Powers of Attorney he objects to.

MR. DEYSHER: I object to all. In support of that objection, I want to call Mr. Charles Duryea.

CHARLES E. DURYEA, Recalled.

By MR. DEYSHER:

Q. You wrote a number of letters to creditors raising objections to the Pennsylvania Trust Company as Trustee, did you not?

MR. WAGNER: I would ask that the letters be produced. They are the best evidence and we need not go into the contents of the letters.

A. I wrote letters, yes sir.

Q. Did Mr. Wagner see any of them before they were mailed?

128 A. Yes, sir.

Q. Did you write that letter? (Handing letter.)

MR. WAGNER: On the last I would like to object. He must be more specific and show which particular ones because Duryea wrote a number of letters I never saw.

A. I wrote that letter.

Q. Did Mr. Wagner see that letter?

A. He did not.

MR. DEYSHER: I offer in evidence the letter dated April 8, 1907, shown witness, addressed to Wadsworth, Blackmon & Wadsworth, Attorneys, at Buffalo, N. Y.

MR. WAGNER: What is the purpose?

MR. DEYSHER: For the purpose of showing that Mr. Duryea represented that the Pennsylvania Trust Company had for its Attorney Mr. Cyrus G. Derr, and represented that he was also the Attorney for Mr. Sternbergh, President of the Duryea Power Company, which fact was not correct as Mr. Derr had withdrawn as Attorney for the Pennsylvania Trust Company, Receiver of the Duryea Power Company. Letter marked Exhibit "H" C. E. Y.

MR. WAGNER: I object to that. In the first place it is immaterial and irrelevant and can have no bearing upon the right of either Mr. Duryea to vote in these matters, or as to my right, from the fact,

First, that I had no knowledge whatever until this moment of the writing of that letter, and, in the second place, because upon the records in 927 Equity Docket, 1907, it appears that Cyrus G. Derr and E. H. Deysher are the Attorneys for the Receiver, as appears by endorsement on the Inventory and Appraisement filed in that case on March 7, 1907, and it being shown by the proceedings here that Mr. Derr was also the Attorney for Mr. H. M. Sternbergh, and there is no paper on record in 927 Equity Docket, 1907, to show the withdrawal of Mr. Derr as Attorney for the Receiver.

REFEREE: Have you any testimony to offer in this matter?

By the REFEREE:

Q. Who are Wadsworth, Blackmon & Wadsworth?

A. They are a concern of Attorneys from Buffalo who wrote for information regarding this property, and this letter was in answer to theirs.

Q. Who did they represent?

A. They represented the Buffalo Auto Body and Trimming Co.

By Mr. DEYSHER:

Q. You also wrote a circular letter to the creditors of the Duryea Power Company in which you made the same statement. That letter was some time in April. Do you have a copy of the letter?

129 Mr. WAGNER: I have a copy of the letter but it is no circular letter.

Q. You solicited from the creditors of the Duryea Power Company Powers of Attorney for yourself or for Mr. Wagner, and both said and wrote to them that Mr. Derr represented the Pennsylvania Trust Company and Mr. Sternbergh, who was President of the Duryea Power Company and that you considered the relation too close for the best interests of the Company?

Mr. WAGNER: I object. Who are the persons to whom they were written? Was that a circular letter or individual.

REFEREE: Ask to whom it was sent?

Q. To which creditors of the Duryea Power Company did you write?

A. I wrote in the first place only to such people I could remember. It was not a very large number, probably forty or fifty persons of the total number of creditors.

Q. In these letters you stated that Mr. Derr represented the Pennsylvania Trust Company, Receiver, and also Mr. Sternbergh, the president of the Duryea Power Company?

A. I have a copy of the first letter sent out to those creditors mentioned by me.

Q. There is a letter, how many of that character did you send out?

A. Only one. That letter was in answer, as I stated, to an inquiry.

Q. How many of the creditors did you see?

Mr. WAGNER: We object. What is the purpose?

Mr. DEYSHER: There was an interview for the purpose of ob-

taining Powers of Attorney from creditors to whom he said that Derr was representing both the Pennsylvania Trust Company, Receiver, and Mr. Sternbergh.

Mr. WAGNER: I would state that question is entirely immaterial and irrelevant as to what he may have said to outside persons as to bind the creditors, denying them the right to vote or me to vote for them, we having no knowledge at all as to what may have been said and unless they bring our attention to particular persons and show that they were improperly influenced by anything Mr. Duryea may have said to influence them to issue Powers of Attorney to me.

Mr. WAGNER: The records show right here that Mr. Derr is the Attorney both for the Receiver and for Mr. Sternbergh.

REFEREE: Mr. Derr is Attorney for the defendant, the Duryea Power Company, and Attorney for the Pennsylvania Trust Company, Receiver, in the second place, and we know he appeared for Sternbergh in the third place. I do not find any withdrawal on the record as Attorney for any of these parties.

130 By Mr. DEYSHER:

Q. Is that your letter? (Indicating.)

A. Yes, sir.

Q. Is that yours?

A. It is not my handwriting but it probably came from our place.

Q. Whose hand writing is that?

A. Miss Clark's, but I could not say positively.

Q. Where did you get the Power- of Attorney?

A. Some were purchased here in Reading. Mr. Wagner furnished some. March 25 is one of the letters Mr. Wagner knew about.

Q. Was it mailed from his office?

A. Part were mailed from his office and part from my house, so I don't know whether it was or not. The girl did the mailing.

Q. You gave her a list and had her mail to all the creditors, all you remembered?

A. Yes, sir, we had less than fifty per cent. of them.

Mr. DEYSHER: Letter marked Exhibit "I" C. E. Y. offered in evidence.

Q. Do you say that you sent out but one letter in which the statement is made that Mr. Derr represented the Pennsylvania Trust Company and also Mr. Sternbergh, President of the Duryea Power Company?

A. I admit sending that one. I don't know how many others I sent. I didn't write many individual letters. Most of the work I sent out was circular letters which Mr. Wagner knows and has copies of.

Q. You also sent out the letter of May 6th?

A. Yes, sir.

Mr. DEYSHER: Letter offered in evidence marked Exhibit "J" C. E. Y.

Q. Mr. Wagner knew of that?

A. Yes, sir, he did.

Q. Did Mr. Wagner tell you that Mr. Derr had withdrawn as the Attorney for the Pennsylvania Trust Company, Receiver of the Duryea Power Company?

A. I don't remember where I first heard that information.

Q. You did know it, however?

A. I learned it later in the proceedings. I didn't know it in the beginning.

Q. You knew it before the letter of May 6 was sent out?

A. I think I did, yes, sir.

131 Q. (Showing letter.) How did you happen to write this clause in that letter?

A. Because I had seen a letter written by Mr. H. M. Sternbergh in which he asserted it was my intention and desire to purchase the plant. He gave information to that effect.

Q. If you knew that Mr. Derr had withdrawn as Attorney for the Pennsylvania Trust Company, Receiver, how did you happen to use this language, "Also to have a Trustee appointed who may not in any way be allied to the President of the Company or to any of the officers or stockholders of the Company so that if any action in the future is necessary to be taken in the interest of unsecured creditors, &c."?

A. I understood Mr. Derr's withdrawal was simply so far as related to this case. I don't know much about the position attorneys occupy, but I had a feeling in my mind that he was still in some way connected with the Trust Company, although not acting in this case.

Q. Did you have any information, did any one tell you that the Pennsylvania Trust Company would not be free to act as Trustee in this matter if they had been elected?

A. I don't remember anybody doing so. I had that feeling that the relation was too close and I expressed that to the best of my ability.

Q. Did you write the entire letter yourself?

A. I don't think I did. Mr. Wagner assisted me. He corrected some things and he may have dictated another paragraph.

Q. That paragraph that I just read was passed on by Mr. Wagner and you sent it?

A. Yes, sir, he passed on the letter and I sent it.

Q. How many of the creditors of the Duryea Power Company did you see personally in reference to this matter?

A. I never kept any account, I think probably twenty or thirty.

Q. And to the people whom you saw, you explained this relation and said to them, as you wrote to some of the creditors, that Mr. Derr represented the Pennsylvania Trust Company, Receiver, and also the Duryea Power Company, and also Mr. Sternbergh, and you considered that relation too close for the best interests of the unsecured creditors?

MR. WAGNER: I object to that because the letter does not say anything that we said Mr. Derr represented the Pennsylvania Trust Company. It is a fact that I don't suppose is denied by Mr. Deysher, that Mr. Derr is both General Solicitor and has been for a number of

years for the Pennsylvania Trust Company, and has been a stockholder of the Pennsylvania Trust Company from the beginning or for a number of years.

132 REFEREE: Let him answer that question.

A. I saw very few creditors until near the date set for the election, so having a better knowledge of the situation occupied by Mr. Derr, I did not make any statements so broad as in this one letter mentioned. I don't know that I made these statements to any excepting possibly two or three of the creditors seen in March and the early part of April.

Q. Did you explain to all of them that Mr. Derr represented the Pennsylvania Trust Company, Receiver, and Mr. Sternbergh, the President of the Duryea Power Company?

A. I did not.

Q. You procured proxies from some of these creditors personally?

A. I think there were two letters of attorney given to me.

Q. Do you mean two given to you to vote?

A. Yes, sir.

Q. There were others, however, made out to Mr. Wagner, your attorney, and handed to you to be delivered to him?

A. I think not.

Q. Are you sure about that?

A. I don't remember any.

Q. These two you say are the only circular letters which you issued?

A. I think that is correct. That is all I remember at present.

Q. Did you not say that what you wanted was to have your claim allowed for the purpose of voting and you did not care much what became of it afterwards?

Mr. WAGNER: I object to that as being entirely immaterial and irrelevant. It is not a question of what he may have said.

REFEREE: I don't think it would be a fraudulent obtaining of proxies. I don't think the question ought to be answered at this inquiry.

Q. Didn't you say that to Mr. Wagner and to some of the creditors in your efforts to obtain proofs of claim and proxies?

Mr. WAGNER: I object to that again. Same objection as before.

Mr. WAGNER: We remove the objection.

A. I don't think I made any such remark to creditors. I may have to Mr. Wagner in the early stages.

Q. You don't remember whether you made them to creditors?

A. I don't think I did.

Q. You are proving your claim for the purpose of voting for a Trustee and don't care what becomes of the claim after the Trustee is elected and have so said, have you not? (Question of this morning repeated.)

133 A. I think I said so to Mr. Wagner possibly in the early stages, but I have changed my mind since and I am proving that claim because I believe it just and that it ought to be proved



in order that I may stand in a proper light among and before the other creditors.

Q. Do you say that you did not say to some of the creditors whom you were interviewing for the purpose of obtaining proxies that what you wanted was to prove the claim in order to vote it, and you didn't care anything for the claim itself?

A. I don't think I made any such statement to any of the people I solicited for proxies.

Q. Do you know Mr. W. C. Hohl?

A. Yes, sir.

Q. What was his position with the Duryea Power Company?

A. He was for several years our head office man.

Q. Did you procure Mr. Hohl to write a letter to the creditors?

A. Mr. Hohl suggested that he would like to give some facts to the creditors and I asked him to submit his letter to Mr. Wagner.

Q. Did you go to see him?

A. I have often gone to see him.

Q. I mean about that matter, or did he come to see you?

A. I don't remember about that. We met frequently and frequently talked over the business of the company.

Q. Where did this suggestion take place that he should write a letter?

A. I think it was in the Hotel Penn.

Q. You knew he had been employed by the Receiver?

A. I didn't think of it in that light. I know he was well acquainted with the Duryea Power Company's affairs.

Q. You knew he was employed by the Receiver at the plant after the Receiver was appointed?

A. I knew he had been employed.

Q. You knew that Mr. Hohl had been discharged?

A. Yes, sir, I think so at that time.

Q. Do you know for what cause?

A. I do not know; I heard from the influence of liquor.

Q. After that you sought him or induced him to write a letter to the creditors advising them to send their proxies to Mr. Wagner, your Attorney?

A. I don't think the word sought is the proper one.

Q. I said sought or induced?

134 A. He was anxious to do this himself, so I think the word induced is not proper.

By the REFEREE:

Q. Please answer the question.

A. No.

By Mr. DEYSHER:

Q. You did, however, see him and in a conversation agreed with him that it would be a good thing for him to write a letter to the creditors and ask him to draw up his letter and submit it to Mr. Wagner?

A. We often met. We agreed that we wanted the creditors to



have the votes and after drawing up his letter, he submitted it to me and I had to submit it to Mr. Wagner.

Q. Did you and he go to Mr. Wagner's office together?

A. I don't remember that. I think we did.

Q. Who had the letter printed?

A. I paid the bill for printing.

Mr. DEYSHER: I offer the letter of W. C. Hohl——

Mr. WAGNER: What is the purpose?

Mr. DEYSHER: This particular letter written to A. A. Frazier, dated May 6, 1907. This is for the purpose of showing that Mr. Duryea was on May 6, 1907, procuring or permitting employees of the company, who had been discharged for intoxication, to continue casting aspersions against the Pennsylvania Trust Company. That in furtherance of the purpose entered into between the witness and Mr. Wagner, this letter was drawn with the consent of the witness.

Mr. WAGNER: We do not object to the offering of that letter but we do state that the letter does not show any undue influence in any way as not a proper letter that cannot be sent to the creditors of a bankrupt concern. The letter does not establish the purpose for which it is offered.

REFeree: That letter is admitted.

Mr. DEYSHER: Letter offered in evidence and marked Exhibit "K," C. E. Y.

By Mr. DEYSHER:

Q. To which creditors was this letter sent?

A. To such list as I had at that time. Probably a little larger list than the preceding letters we sent, but I did not have the complete list.

Q. From where was it sent?

A. I think Mr. Hohl sent them himself, from his house I suppose.

Q. You furnished him with the list?

135 A. My young lady may have given that. I don't know how he got it.

Q. You furnished the envelopes and stamps?

A. I furnished some of the stamps and he furnished some himself. I think I furnished the envelopes.

Mr. DEYSHER: I offer in evidence these letters marked Exhibit "L," C. E. Y.

Mr. WAGNER: I desire to object to the offering of the letters for the purpose stated, that is, as being such letters as would show that any undue influence was attempted by me as Attorney for Roger C. Aldrich and other creditors to influence the unsecured creditors of the Duryea Power Company to unite with us in the election of a Trustee.

By Mr. DEYSHER:

Q. Here is a clipping that was included in one of the letters that was returned, did you send that Mr. Duryea?

A. I do not know.

Mr. WAGNER: I sent that.

Mr. DEYSHER: I offer that clipping in evidence as referred to, marked Exhibit "M," C. E. Y.

Mr. WAGNER: That was enclosed in a letter that was sent out on June 7, and was enclosed for the purpose of showing the testimony that was given by Mr. Sternbergh on his claim against the company, so that the unsecured creditors might see the exact status of his claim. I would further state that the article contains the testimony as found in the notes almost verbatim and was written without my knowledge or procuration and was published.

Q. Did you have any transactions with Mr. Dumn, of Dumn & Schaeffer?

A. Not that I remember.

GEORGE W. WAGNER, Esq., sworn:

Mr. WAGNER: On April 3, I received a letter from the Penn Spring Works in which they asked me whether I could give them any information about the Duryea Power Company or Mr. Duryea himself, and what would be the chances of getting anything out of the estate of the Power Company. That letter concluded in thanking you in advance and awaiting, "yours truly."

REFEREE: The letter will speak for itself.

Mr. WAGNER: I offer this letter in evidence, marked Exhibit "N," C. E. Y. That opened my correspondence with the Penn Spring Works.

On April 4, I received a letter from the Penn Spring Works in which they enclosed a proof of claim in their case, stated there would be a general letter of attorney sent to me later. Letter offered in evidence and marked Exhibit "O," C. E. Y.

It was in pursuance of these two letters I had my subsequent correspondence with the Penn Spring Works. I wrote several letters to them asking them to forward to me the Power of Attorney they had stated they would forward to me.

REFEREE: Did you get the Power of Attorney?

Mr. WAGNER: I didn't get the Power of Attorney and they never told me I was not to represent them.

The other correspondence sent out by Mr. Duryea and also by myself, was the correspondence which was offered here and sent for the purpose of acquainting the creditors with the state of affairs, I having been first employed by Roger C. Aldrich of Elizabeth, N. J., who has an unsecured claim against the company for \$11,500. I desire to state also that it appeared on record at first that Mr. Derr was Attorney for the Pennsylvania Trust Company as Receiver. I desire to state that Mr. Derr is, and has been for a number of years, the General Solicitor of the Pennsylvania Trust Company, the Receiver in this case, and also understood that he has been a stockholder since the incorporation of the Pennsylvania Trust Company.

I would also desire to state that the letter of Mr. Duryea of May 6, contains the facts to a large extent as is shown in 927, Equity

Docket, 1907, in connection with the appointment of the Pennsylvania Trust Company as Receiver. Also that the letter of June 7, written by me, which contains the clause, "Your claim was presented by me" was written to acquaint my clients as to what had been done and also to guard them against revoking the Powers of Attorney.

MR. DEYSHER: I object to that. That letter must speak for itself.

REFEREE: I guess the letter must speak for itself. It is not what you had in mind. It is what the Receiver got from the letter.

MR. WAGNER: I desire to offer in evidence the letter issued by H. M. Sternbergh on June 10, and sent to the creditors of the Duryea Power Company.

MR. DEYSHER: You cannot offer that in evidence.

Cross-examination..

By MR. DEYSHER:

Q. I showed you a copy of the letter which Mr. Derr sent me at the time of his withdrawal as Counsel for the Pennsylvania Trust Company, Receiver, did I not?

137 A. That is my impression, yes.

Q. At or about the time the letters were written, either that day or a day or two after that I showed you the letters?

A. I don't remember the time. I remember you showed me a letter but I could not specify as to the time.

Q. You had seen this letter before any of the other letters were sent out?

A. No. I did not. The letter of March 25, was sent out before that letter was written.

Q. Before any of his other letters were sent out?

A. Of Mr. Duryea's other letters.

Q. Yes, his circular letters?

A. Yes, before May 6, I am sure the information was given me.

Q. Did you give that information to Mr. Duryea?

A. I think I did, but I don't know when for the reason that Mr. Duryea was out of town a great deal. I at the same time told him that Mr. Derr was the General Solicitor of the Pennsylvania Trust Company.

MR. DEYSHER: The letter by Mr. Derr to myself and also the copy of the letter written by Mr. Derr to H. B. Hagy, Trust Officer of the Pennsylvania Trust Company Receiver of the Duryea Power Company, both dated March 30, 1907, are the letters that were shown to Mr. Wagner and identified by him and are offered in evidence, and marked Exhibits "P" and "Q," C. E. Y.

HARRY B. HAGY, SWORN.

By MR. WAGNER:

Q. What is your position in the Pennsylvania Trust Company?

A. Treasurer and Trust Officer.

Q. That is the head officer?

A. The President is the head officer, but I have the active managing of the company.

Q. Is Mr. Cyrus G. Derr connected with the Pennsylvania Trust Company?

A. Our General Attorney.

Q. And has been for how many years?

A. Twenty-one years.

Q. Is he a Director of the company?

A. He is.

138 Q. I believe the Pennsylvania Trust Company was organized largely through the influence of Mr. Derr?

A. That I could not say.

Q. He has been connected with the Trust Company from the beginning?

A. Yes, sir.

Q. He is still the General Solicitor?

A. Yes, sir.

Q. At first when these proceedings began, Mr. Derr was also acting for you as one of the Attorneys as Receiver for the Duryea Power Company?

A. He was.

Q. Afterwards he ceased to act?

A. He withdrew.

Q. But he has been all along up to the present time your General Solicitor?

A. He has.

Q. You filed a petition as Receiver in the Court of Common Pleas to 927, Equity Docket, 1907. In that petition you stated that on December 27, 1906, H. M. Sternbergh, in consideration of the loan of five thousand dollars, executed an assignment of all bills receivable and all right, title and interest in all vehicles manufactured and unmanufactured, &c., how did you get the information?

A. I saw a copy of the assignment.

Q. Did Mr. Sternbergh say anything to you about it?

A. I think he did.

Q. He also told you he had a claim when he presented the assignment to you?

A. He never filed it with me. He merely showed it to me.

Q. He claimed a lien, did he not?

A. I cannot say there was anything formal said to me on that subject. He showed it to me simply because he had a claim.

Q. He presented to you as Receiver this agreement that he had with the Duryea Power Company giving to him the right, title and interest and the bills receivable, &c., did he not?

A. He never presented it to me. I think I found a copy of it in the office that the stenographer had written.

Q. What did he say to you in regard to this?

A. I subsequently saw it and what he said to me, I don't know.

Q. Did he bring the original to you and show it to you?

A. He didn't bring it to me.

139 Q. You also state in that petition that the said H. M. Sternbergh has informed your petitioner that by a written assignment, which has been mislaid, the Duryea Power Company conveyed to him six automobiles which have been sent to California for a loan of \$4,705.50?

A. He made that statement to me in writing.

Mr. DEYSHER: What is the purpose of this?

Mr. WAGNER: To show that here was Mr. Sternbergh claiming a preference on all the book accounts and unfinished vehicles and also on six automobiles; Mr. Sternbergh claiming that preference was writing letters to the creditors and I thought it was necessary to give the information that was given by these letters and so on, for the purpose of acquainting the creditors with the exact status of their position.

And further, in support of the testimony which we propose to give to show that the Pennsylvania Trust Company could not be appointed as Trustee under these circumstances, facts having been solicited for the Pennsylvania Trust Company by letters and otherwise by Mr. Sternbergh, who claims to have a preference and lien on the property of the Duryea Power Company to the extent of \$9,705.50, and who is also resisting the claim against him by the creditors of twenty-six thousand dollars in his unpaid subscription. To show that he has an interest personally and is trying to take away from the unsecured creditors the assets of the Power Company for the purpose of applying them to his own claims, and desires to select a Trustee in accordance with his views.

Mr. DEYSHER: The point I am raising is this. We are now taking testimony passing on your right to vote. To anything bearing on that subject I have not the slightest objection.

Mr. WAGNER: I will have it stricken out.

REFEREE: The question cannot be asked with reference to Sternbergh's proxies.

Mr. DEYSHER: I have no objection to anything that can be offered on the subject in question.

CHARLES E. DURYEA, recalled.

By Mr. WAGNER:

Q. In that letter of May 6, that was offered here in evidence, that was written to the creditors of the company by reason of what?

Mr. DEYSHER: Letters must speak for themselves.

REFEREE: The question is, why was the letter written. That question is a proper one here. It is not a question of what you mean by the letter.

140 Q. Why was that letter written?

Mr. DEYSHER: It seems to be objectionable.

REFEREE: I think it is all right.

A. I think the first three clauses of the letter explain my views.

Q. Had you received a letter written by Mr. Sternbergh?

A. Yes, sir.

Q. And the letter you had received that Mr. Sternbergh had sent had contained——

MR. DEYSHER: That is objected to. That letter must speak for itself.

REFEREE: I think that is right.

HARRY B. HAGY, recalled for cross-examination.

By MR. DEYSHER:

Q. Did you receive from Mr. Derr a letter dated March 30, 1907, and marked Exhibit "P," on that date?

A. I did.

Q. From that time has Mr. Derr acted in this matter for the Receiver?

A. He has not. I have always consulted with you.

Q. I have been the sole counsel since the 30th of March.

A. The only counsel.

Q. The duties of Mr. Derr as General Counsel of the Company do not affect estates in which you are interested as Trustee which are represented by other counsel?

A. He has no duties whatever in connection with this estate.

By MR. WAGNER:

Q. Is it not a fact that when you are not quite satisfied with the advice of the Attorney in particular estates, that you refer to Mr. Derr?

A. I have not had such occasion since I have been Trust Officer of the institution.

Q. Didn't you just recently in the year past refer a certain matter of title to Mr. Derr as your Counsel, although Mr. Adam Reeser was Counsel for Mrs. Bright?

A. Only with Mr. Reeser's approval.

Q. Then it is done with the approval of the person who may be Attorney for the other party?

A. Mr. Reeser requested that to be done.

141 Q. Then under these circumstances you refer a matter to your General Counsel?

A. In this particular case I did.

Q. Is that the only case?

A. I don't know of any others.

Q. You didn't know of any other?

A. This was a peculiar case and Counsel requested me to do so.

Q. If Mr. Deysher requested you in this matter to refer to Mr. Derr, what would you do?

A. I don't think there are any peculiarities that would render Mr. Deysher incapable of acting in this matter.

MR. KREMP: I object to anything like that. It is not a proper question. It is not a fair question.

MR. WAGNER: I would ask now to vote my proxies. The only thing I propose to file is this general objection.

Mr. DEYSHER: I insist on the objection I raised with respect to their voting the Powers of Attorney. I object to the voting of the proxies by Mr. George W. Wagner and Charles E. Duryea for the following reasons:

1. The testimony adduced shows that Mr. Duryea issued incorrect statements to creditors for the purpose of inducing them to execute Powers of Attorney to either himself or Mr. Wagner, for the purpose of bringing about the election of the Berks County Trust Company, it clearly appearing that creditors were led by the letters and assertions of Mr. Duryea and the letters of Mr. Wagner to believe that their interests would not be safe in the hands of the Pennsylvania Trust Company.

2. That their showing such a combination between Mr. Wagner and Mr. Duryea, in connection with a discharged employee, Mr. W. C. Hohl, to induce creditors to appoint Mr. Wagner as their Attorney, in fact and that in their efforts to procure said Powers of Attorney, creditors were misled and the Pennsylvania Trust Company subjected to unwarranted aspersions and slander.

3. That in the set off of the claim of the Duryea Power Company against the claim of Mr. Charles E. Duryea it has been shown that he has no claim whatever, and that in the other claims, the Powers of Attorney were illegally procured.

REFEREE: The letters written to Wadsworth, Blackmon & Wadsworth, Attorneys, and to the Penn Spring Works, whatever they may contain, need not be considered because no Powers of Attorney were obtained in consequence of them.

The only thing that would make a Power of Attorney invalid would be an assertion of such untruths as would falsely represent to a creditor the state of facts and by such false representations obtain a proxy. The false representation principally insisted on here is the representation that Cyrus G. Derr was Attorney for the Pennsylvania Trust Company, a corporation, and of the Pennsylvania Trust Company Receiver of the Duryea Power Company, and for Mr. H. M. Sternbergh. These representations were made in their entirety in only one instance and that is the letter to the Wadsworth people, which has been put out of question.

The other letters dated March 25th and May 6th, written by C. E. Duryea, and of May 6th, written by W. C. Hohl, do not refer to this alleged incorrect statement as to the position held by Cyrus G. Derr, Attorney. To my mind these letters seem only to set out a state of facts as they appear and it has not been shown that the facts alleged in these letters are not true. I cannot see anything in these letters that is not essentially correct as far as statements of fact are concerned, and I don't think that the inferences drawn from the statements of fact are of such a kind as would improperly influence the mind of a creditor.

I therefore conclude that because the letters offered in evidence do not contain falsehoods which might influence a creditor to give his proxy and because there is not enough in them from which a false inference might be drawn, but on the contrary because it appears that their statements might result in an inference that might



be correct, the motion to strike off the record the Powers of Attorney to Charles E. Duryea and George W. Wagner and prevent them from voting at this time is overruled. No objection has been made to these proxies on the ground that they were obtained by the influence of the bankrupt, and because such a point has not been raised. I for my part shall certainly not go into it. The objections seem to have been based on the issue that proxies were obtained by fraud. I don't so find.

The claim of Charles E. Duryea has been opposed here and has been prima facie made out and proven excepting about One Hundred Dollars appearing as duplications, which has not been contradicted. It has been gone over in detail. It is true too little active attempt at contradiction was made, and it must therefore be allowed and may participate in the vote for Trustee.

Mr. DEYSHER: Exceptions for creditors represented by E. H. Deysher, Esq.

Mr. WAGNER: I would now ask to vote for the reason that Mr. Duryea would like to go out of town as soon as possible.

Mr. DEYSHER: I give notice of an appeal.

REFEREE: The election of the Trustee may be held. The proper procedure for any one dissatisfied with the result of an election, either dissatisfied on account of improper testimony admitted or on account of rulings made by the Referee is to obtain a certificate of review which can be had of course on application to the Referee. The question of the legality or illegality of the choice of a Trustee can then be passed on by a higher Court.

Mr. WAGNER: I cast my votes for the Berks County Trust Company.

Mr. DEYSHER: I cast mine for the Pennsylvania Trust Company.

Mr. DURYEA: I cast my votes for the Berks County Trust Company.

REFEREE: Nineteen (19) proxies were left with me by H. M. Sternbergh, said proxies having been issued to him; he asked permission to absent himself from the meetings unless called for and asked the Referee to announce his vote in favor of the Pennsylvania Trust Company, which the Referee agreed to do. One of these proxies, to wit, that given by the Reading Wood Pulley Company, is essentially a duplicate. The Reading Wood Pulley Company has issued a Power of Attorney to B. F. Dettra, Esq., and he has already cast his ballot for the Pennsylvania Trust Company. I now announce that these eighteen proxies are voted for the Pennsylvania Trust Company, no objection being heard.

Mr. KREMP: I wish to state that the individual vote of H. M. Sternbergh would be voted for the Pennsylvania Trust Company as Trustee, only it was ruled out by the Referee. This would tie the vote, and they would not have a majority in number and amount, and there would not be an election of Trustee and we object to said election. My votes are cast for the Pennsylvania Trust Company.

REFEREE: Seventy-six (76) votes have been cast for the Pennsylvania Trust Company, totalling about Ten Thousand Dollars. Seventy-seven (77) votes have been cast for the Berks County Trust Company, totalling about Forty-five Thousand Dollars.



I will declare the votes closed as far as other votes are concerned unless both Counsel are willing to agree that it shall not be closed. If the result as to numbers and amount is incorrect, the election would not be closed because the Trustee to be appointed by creditors must have a majority in number and amount. I declare the Berks County Trust Company is elected Trustee.

Mr. DEYSHER: There are a number of automobiles there that are completed and ready for the market. I have been holding them at \$1200 or \$1250. We decided on a sale to-day of one of them and we may have within a very short time other offers for other machines. I want the opinion of the creditors.

Mr. WAGNER: Let that matter be referred to the Trustee, who will accept to-morrow. Let the Trustee be informed and if it is ready, he can get an order from the Trustee.

I think the creditors desire to have appraisers appointed because since it has gone into the hands of the Pennsylvania Trust Company, a great many parts have been sold and manufactured in the vehicles and the property there to-day is not the property there several months ago.

Mr. DEYSHER: It seems there ought to be an appraisalment.

REFEREE: Let the appraisers be appointed. The following persons named were suggested for appointment as appraisers: Daniel Printz, Thomas Dalzell, John X. Xander, Richard T. Leaf.

Adjourned meeting for the purpose of examining the bankrupt will be held, if there is any examination of the bankrupt desired, on Tuesday, July 9, 1907, at 10 o'clock, A. M.

The foregoing is a report of first adjourned meeting of creditors held June 20, 21, 22 and 24, 1907, with notes of testimony taken.

Witness my hand July 2, 1907.

(Signed)

SAMUEL E. BERTOLET, *Referee*.

United States District Court, Eastern District of Pennsylvania.

No. 2768. In Bankruptcy.

Re DURYEA POWER COMPANY.

*Certificate of Referee.*

McPHERSON, *District Judge:*

Of the two questions arising under this certificate, the first has to do with the refusal of the referee (Samuel E. Bertolet, Esq.) to permit Herbert M. Sternbergh to vote upon his claim in the election of a trustee. The claimant intended to vote for the Pennsylvania Trust Co., which received 76 votes, cast by creditors holding about \$12,000 of claims, while the Berks County Trust Co., which was declared elected, received 77 votes, cast by creditors holding claims aggregating about \$15,000. Since, therefore, it is evident that, if the claimant had been permitted to vote, there would have been no election by the creditors, and the present trustee could not have been declared their choice, it becomes important to determine whether the

referee was right in rejecting the claimant's offer to vote. The correctness of this ruling will be found to depend upon the relation borne by the claimant to the bankrupt corporation at the time when the proceedings in this court were begun. Admittedly he was then a

145 creditor, but, if he were also a debtor, I do not understand his counsel to deny that he was properly excluded from the vote

the fact being also conceded that he has not made his indebtedness good. At all events, the action of the referee is in accord with the decision of this court in *Re Wiener & Goodman Shoe Co.*, 96 Fed. 949, and, for the present at least, the point must be regarded as settled. Was he, therefore, a debtor of the corporation? Or, to ask an equivalent question, may the creditors of the corporation treat him as a debtor? The answer is to be found in facts that are not in dispute, and may be summarized as follows:

On February 13, 1900, an agreement was entered into between Charles E. Duryea, Henry Millholland, Henry Crowther and the claimant, of which the paragraphs now material are these:

"The said parties, in consideration of the mutual covenants hereafter set forth, agree to organize a corporation forthwith under the laws of Pennsylvania, for the manufacture and sale of automobiles, motors and propellers, to be called Duryea Power Company, with a paid up capital of \$100,000, divided into 1000 shares of \$100 each, whereof said Herbert M. Sternbergh shall receive 510 shares, and Charles E. Duryea, 300 shares, said Henry Millholland, 95 shares, and said Henry Crowther, 95 shares.

"Upon the incorporation of said company, in full consideration of said issue of stock to them, said Herbert M. Sternbergh shall contribute \$10,000 cash and within sixty days thereafter \$15,000 cash additional; and said Herbert M. Sternbergh, Henry Millholland and Henry Crowther shall contribute to said corporation the entire and absolute ownership of all patents pertaining to the manufacture or use of automobiles, motors and propellers or parts of either heretofore granted to or now or hereafter controlled by either of them, and all inventions of the description aforesaid heretofore made by either of them, or which either of them shall hereafter make, and all patents which may be granted therefor; said Charles E. Duryea, in consideration of the issue of stock to him and the sum of \$10,000 to be paid as hereafter provided, shall contribute to said corporation licenses to use all patents and inventions now or hereafter controlled by him, or by the Duryea Manufacturing Company of Peoria, Illinois, pertaining to the manufacture or use of motors, propellers and light automobiles, etc., etc."

Of these persons, Duryea alone, either then or afterwards, owned patents of the kind described, it being the intention of all the parties to form a corporation to put his inventions upon the market. Pursuant to this agreement, the bankrupt corporation—the Duryea Power Company—was incorporated on April 6, under the corporation statutes of Pennsylvania, with a capital stock of \$1000, divided

146 into 10 shares of \$100 each, of which the claimant subscribed for 4 shares. He with others signed and acknowledged the certificate of incorporation, was named as a director therein,

and was elected president on April 20. Upon the last named day a meeting of the stockholders was held to take action upon a proposed increase of stock from \$1000 to \$100,000, and the claimant and two other persons were appointed judges to conduct the election. The formalities required by the Pennsylvania law relating to the increase of capital stock were duly complied with, and all the stockholders, including the claimant, voted for the increase. On the same day a second agreement was signed, of which the essential provisions are as follows:

"This agreement made the 20th day of April, 1900, between Herbert M. Sternbergh, of the city of Reading, in the county of Berks and State of Pennsylvania, of the one part, and the Duryea Power Company, a corporation of the State of Pennsylvania, of the other part, witnesseth:

"The said Herbert M. Sternbergh has paid to the said Duryea Power Company, in cash the sum of \$10,000 lawful money of the United States of America, the receipt whereof is hereby acknowledged, and agrees to pay the sum of \$15,000 additional in like lawful money to the said Duryea Power Company on or before the 5th day of June, 1900, and hereby assigns and sets over to the said Duryea Power Company, its successors and assigns, the entire, absolute, full and exclusive ownership of all patents pertaining to the manufacture or use of automobiles, motors and propellers, or parts of either, heretofore granted to or now controlled by him," etc., etc.

In consideration whereof the said Duryea Power Company agrees to issue to said Herbert M. Sternbergh 510 full paid shares of the capital stock of the said Duryea Power Company upon the payment of the whole amount of \$25,000 above mentioned, including however in the said 510 shares, 4 shares now standing in his name on the books of the said company."

This agreement was signed by the claimant individually, and also as president of the bankrupt corporation. On October 27, as president of the company, he certified to the Secretary of the Commonwealth as follows:

"This is to certify that by virtue of the consent of the stockholders of the Duryea Power Company, authorizing an increase of the capital stock thereof from \$1000 to \$100,000, given at an election duly held for that purpose on the 20th day of April, 1900, the capital stock of said company has been increased from \$1000 to \$100,000; said additional stock being issued for cash and property."

On the same day a certificate of stock for 510 shares of the par value of \$100 was issued to the claimant, and receipted for by him. He has carried out his agreement to pay \$25,000 "in full consideration of said issue of stock," but he has neither paid nor contributed any other money or property therefor. The balance of the par value, \$26,000, is said by the other creditors to be still owing, and this is the ground upon which the referee declared him to be a debtor and excluded him from voting. In my opinion, the exclusion was right. That he continues to be liable to the Bankrupt's creditors for all, or the part of this unpaid balance, seems to me scarcely a debatable question. It is of no importance that he did

not formally subscribe for 510 shares of the stock; by virtue of his agreements they were to be allowed to him in consideration of \$25,000 to be paid in cash, and they were actually so allotted, were issued and received. This is equivalent to a formal subscription, and carries with it the same obligation. Neither is it of importance that the stock was to be issued "full paid," and that it was so issued with the intention of all parties then interested that his acceptance should carry no further obligation. Although described as "full paid" the stock had only been partly paid for in cash, and no declaration or action by the corporation, or by the claimant, or by both, could take the place of the truth concerning this matter, so far as to affect the rights of the corporation's creditors.

But, under the statutes of Pennsylvania, shares of stock may be paid for in property as well as in cash, and payment in one is usually as effective as payment in the other. Upon this point, section 17 of the General Corporation Act of 1874 (as amended in 1876, P. L. 32) provides as follows:

"Every corporation created under the provisions of this act or accepting its provisions, may take such real and personal estate, mineral rights, patent rights and other property, as is necessary for the purposes of its organizations and business, and issue stock to the amount of the value thereof, in payment thereof, and the stock so issued shall be declared and taken to be full paid stock, and not liable to any further calls or assessments; and in the charter and the certificates and statements to be made by the subscribers and officers of the corporation, such stock shall not be stated or certified as having been issued for cash paid into the company, but shall be stated or certified in this respect according to the fact; and the executors or administrators of any deceased tenant in common of lands, mines and mineral rights so proposed to be taken may, and they are hereby authorized, to convey the individual estate and interest of such decedent therein to such company, receiving therefor so much stock in such company as the said decedent would have been entitled to receive in his lifetime, to be held in the same manner as the lands: Provided, That no directions or limitations contained in any last will and testament of such decedent shall be in any manner interfered with: And provided, That before making such conveyance, such executors or administrators shall give sufficient security, to be approved by the Orphans' Court having jurisdiction of their

148 accounts, for the faithful application of the stock received therefor; no such corporation shall issue either bonds or stock except for money, labor done, or money or property actually received, and all fictitious increase of stock or indebtedness in any form shall be void; every such corporation may provide for the issue of deferred stock in payment for such real or personal estate or mineral rights, and if so provided, it shall be expressly stated in the charter filed, or in a certificate to be made and recorded, or in the acceptance of this statute, to be filed by any corporation accepting its provisions, with the amount of such deferred stock, and the consideration of the same, and the terms on which the same shall be issued; and the said stock may be made to await payments of dividends thereon, until out of

the net earnings at least five per centum has been declared and paid upon the other full paid stock of the corporation."

Moreover, it has been decided by the Supreme Court of the State that the parties interested in the formation of a corporation may value a patent or other property at whatever sum they please; and it is evident, I think, that no legal harm is done thereby, if due notice of such valuation is given in the proceedings for incorporation or for the subsequent increase of the capital stock. Speaking generally, and laying aside the question of a fraudulent valuation; if the parties interested in the corporation choose to base the capital stock largely upon property instead of upon cash, and notify the public that they have made such a choice, describing the property sufficiently and stating the sum at which it has been valued, the transaction is valid and the stock may issue "full paid" without being liable to objection on the ground that only part of the par value has been paid in cash. But, if this result is to be attained, notice is essential, and notice includes such a description and valuation of the property as will identify it, and will show also that sum in cash it is intended to represent. Upon principle, there should be no difference in this respect between the original proceedings to obtain a charter and subsequent proceedings to increase the capital stock, and no difference is recognized by the Pennsylvania statutes. The Act of 1901 (P. L. 1) relating to increase of capital stock, makes no specific provision on the subject, probably regarding it as already covered by Section 17 of the Act of 1874, but the approved forms in use before the State Department show clearly that definite notice is necessary in both proceedings: Whitworth, *Corporations in Pennsylvania*, sections 1365 and 1392; Eastman, *Private Corporations in Pennsylvania*, sections 1500 and 1512.

Nothing of the kind was attempted in the present case. Neither in the original charter, nor in the proceedings to increase the capital stock, does it appear that the stock is based upon a patent at all, and in neither proceeding is a valuation put upon the right. It is true that the claimant, acting as president of the corporation certified that "said additional stock (was) issued for cash and property," but such a vague and general statement does not give the necessary information to the public. It does not set forth how much cash was paid, and what kind of property was contributed in lieu of cash; and it gives no information concerning the quantity of the property, or the value that has been put upon it. I may point out also, but without laying stress upon the fact, that the proceedings to increase nowhere state that the new stock is to be issued full paid and non-assessable, or that the property for which it is issued is necessary for the purpose of the organization and business of the corporation. So far as creditors are concerned, therefore, the certificate of increase, although it speaks of "property," affords no protection to the claimant: for in legal effect, the reference to property may be disregarded, and the certificate then amounts to no more than an untrue declaration that the increase was wholly based upon cash. Under these circumstances, the claimant cannot escape liability upon so much of the par value of his stock as he has not paid for in cash.

To what extent he may be thus liable, is not now involved, and is not decided. It is enough to justify the ruling of the learned referee, that a liability to some extent exists; and of this, at least, I entertain no doubt.

The second question is raised by the claimant's objections to certain communications that were made to creditors by counsel and by other persons interested in the choice of the Berks County Trust Co. as Trustee. These communications are said to have influenced the election improperly, and a good deal of testimony was taken upon the subject. It is unnecessary to set out the facts in detail concerning this dispute; they will be found in the Referee's report, and I shall only add concerning them, that, after due consideration, I find nothing materially objectionable in the communications referred to.

The action of the Referee upon each of the foregoing questions is therefore affirmed.

U. S. District Court.

In Bankruptcy. No. 2768.

In the Matter of DURYEA POWER Co., Bankrupt.

*Præcipe for Record Sur Petition of H. M. Sternbergh for  
Revision, &c.*

The Clerk will include in the record for the Circuit Court of Appeals sur Petition of Herbert M. Sternbergh for Revision of the Decision of this Court, the following papers, namely:

150 Referee's Certificate of Review with the exhibits thereto attached, filed July 25, 1907.

Notes of proceedings of first meeting of creditors, filed July 25, 1907.

Notes of proceedings of adjourned first meeting of creditors, filed July 25, 1907.

Opinion of this Court, filed January 8, 1908.

And no other papers.

CYRUS G. DERR,  
JOHN G. JOHNSON,

Per J. W. BAYARD.

*For Petitioner.*

February 8, 1908.

UNITED STATES OF AMERICA,

*Eastern District of Pennsylvania, ss:*

I, William Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the foregoing are true and faithful copies of

(1.) Referee's Certificate of Review with the exhibits thereto attached, filed July 25, 1907.

(2.) Notes of proceedings of first meeting of creditors, filed July 25, 1907.

(3.) Notes of proceedings of adjourned first meeting, of creditors, filed July 25, 1907.

(4.) Opinion of this Court, filed January 8, 1908.

(5.) Præcipe as to what papers shall constitute the Record on petition of H. M. Sternbergh, for revision, &c.

In the matter of Duryea Power Company, Bankrupt, in Bankruptcy, Cause No. 2768.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at Philadelphia, this eighteenth day of February, A. D. 1908, and in the one hundred and thirty-second year of the Independence of the United States.

[SEAL.]

W. W. CRAIG,

*Clerk District Court of the United States,  
Eastern District of Penna.*

151 In the United States Circuit Court of Appeals for the Third Circuit.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. No. 2768.

In the Matter of DURYEA POWER CO., Bankrupt.

To the Honorable the Judges of the Circuit Court of Appeals of the Third Circuit of the United States:

The Petition of Herbert M. Sternbergh, respectfully shows.

That your petitioner resides at Reading, Pennsylvania, and is a creditor of the Duryea Power Company, a Bankrupt, which was so adjudged by the District Court of the United States for the Eastern District of Pennsylvania, on the first day of May, 1907.

That after such adjudication the following proceedings were had in the case of the said bankrupt.

A meeting of creditors was duly called by Samuel E. Bertolet, Referee in Bankruptcy, for the election of a Trustee, and said meeting was held on the twenty-fourth day of June, 1907. At said meeting your petitioner presented a proof of claim for the sum of \$14,438.86, being the aggregate amount of certain notes of the bankrupt, and offered to vote upon the election of a Trustee of the estate of the said bankrupt. At the same meeting George W. Wagner and Charles E. Duryea presented proofs of certain other claims against said bankrupt, together with powers of attorney in their favor respectively, authorizing them to vote upon the election of such Trustee. The Referee refused to allow the said claim of your petitioner to be filed for voting, and did allow the said George W. Wagner and Charles E. Duryea to vote under the powers of attorney held by them upon the claims, proofs of which they produced.



Whereupon, your petitioner filed a petition for the review of the said action of the said Referee.

The said Referee certified the question so raised to the said District Court for review, stating:

"That the questions presented on this review are:

"1. Did the Referee err in refusing to allow the claim of Herbert M. Sternbergh for \$14,438.86, to be filed for voting."

"2. Did the Referee err in allowing George W. Wagner, Esq., and Charles E. Duryea, Esq., to vote claims under powers of attorney held by them in the election of a Trustee?"

After taking such action upon said claims the Referee  
152 proceeded to hold the election for Trustee of the said bankrupt. At said election the Pennsylvania Trust Company received seventy-six votes and the Berks County Trust Company, which was declared elected, received seventy-seven votes. The said George W. Wagner and Charles E. Duryea voted upon the claims, on which the Referee permitted them to vote as aforesaid, in favor of the Berks County Trust Company. If your petitioner had been permitted to vote upon his claim he would have voted in favor of the Pennsylvania Trust Company. If your petitioner had been permitted to vote there would have been no election by the creditors, unless the said George W. Wagner and Charles E. Duryea had been prevented from voting upon their powers of attorney. If the said George W. Wagner and Charles E. Duryea had been prevented from voting upon said claims, the majority both in number and amount of the creditors present and allowed to vote, would have been in favor of the Pennsylvania Trust Company. In neither case could the present Trustee have been declared the choice of the creditors of the bankrupt.

That on the eighth day of January, 1908, an order was granted by the said District Court of the United States, in an opinion, a copy of which is hereto annexed, which concluded in the following words:

"The action of the Referee upon each of the foregoing questions is therefore affirmed."

That said order was erroneous in matter of law in that:

1. The learned Judge erred in confirming the order of the Referee refusing to allow the claim of Herbert M. Sternbergh for \$14,438.86, to be filed for voting upon the election of Trustee.

2. The learned District Judge erred in confirming the action of the Referee in allowing George W. Wagner and Charles E. Duryea to vote under powers of attorney held by them upon the claims, proofs of which they presented, at the election of the Trustee.

Wherefore, your petitioner feeling aggrieved because of such order, asks that the same may be revised in matter of law by your Honorable Court, as provided in Section 24 B, of the Bankruptcy Law of 1898, and the rules and practice in such cases made and provided.

HERBERT M. STERNBERGH, *Petitioner.*  
CYRUS G. DERR,

JOHN G. JOHNSON,

Per J. W. BAYARD, *Attorneys for Petitioner.*



153 COMMONWEALTH OF PENNSYLVANIA,  
*City and County of Philadelphia, ss:*

I, Herbert M. Sternbergh, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true according to the best of my knowledge, information and belief.

HERBERT M. STERNBERGH.

Subscribed and sworn to before me this 18th day of January, 1908.

CARLYLE H. ROSS,  
*Notary Public.*

[SEAL.]

My commission expires on the 16th day of Jan'y, 1909.

In the United States Circuit Court of Appeals for the Third Circuit.

In Bankruptcy. No. 2768.

In the Matter of DURYEA POWER Co., Bankrupt, &c.

February 8, 1908.—Petition for revision on behalf of Herbert M. Sternbergh, being presented by counsel for Petitioner to me at chambers, it is ordered that the said Petition may now be filed *nunc pro tunc*, but subject to objection on behalf of any party in interest which may be made and filed within ten days from the date of this order.

GEO. M. DALLAS,  
*Circuit Judge.*

154 And afterwards to-wit, on the sixteenth day of March,

A. D. 1908, this cause being called for argument on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and being argued by counsel for the respective parties, before Hon. George M. Dallas, Hon. George Gray and Hon. Josephn Buffington, Circuit Judges, and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to wit, on the eighth day of May A. D. 1908, comes the parties aforesaid by their counsel aforesaid and the court now being fully advised in the premises renders the following opinion, to wit:

In the United States Circuit Court of Appeals for the Third Circuit.

HERBERT M. STERNBURGH, Petitioner,

vs.

DURYEA POWER COMPANY, Bankrupt-Appellee.

Before Dallas, Gray, and Buffington, Circuit Judges.

BUFFINGTON, *Circuit Judge.*

In the bankruptcy proceeding of the Duryea Power Company in the court below, Sternbergh, the petitioner for review sought to prove

his claim of \$14,000 and to vote in the election of trustee. The referee held Sternbergh was indebted to the company in \$28,000 on 510 shares of its stock and rejected his claim. On hearing, the court approved the action of the referee. Thereupon Sternbergh petitioned for review.

The facts are not in dispute and the substantial question involved is the alleged liability of Sternbergh on the stock. After a careful study of the facts, we are of opinion the referee failed to  
155 grasp the significance of the transaction as a whole and what the agreements between the parties sought to effect. No question of good faith is involved nor is there any doubt that what the parties had in view could lawfully be done by filing papers and proceedings. Mr. Hiester, a lawyer of high standing, has testified to the purpose of the parties and frankly assumes the blame if the papers and proceedings fail to effect such purpose. The entire matter was one between the four men, Sternbergh, Duryea, Mulholland and Crowther. No one else was interested and no question is involved of any outside party buying stock in the Duryea Power Company, the present bankrupt. Duryea and Duryea M'fg Company of Peoria, Illinois, had some patents which the four parties contemplated acquiring with a view to making auto-freight trucks at Reading, Pa. To obtain license under these patents it was necessary for Duryea to pay the Peoria Company ten thousand dollars. Presumably, Mulholland and Crowther had some interest in the patents or rendered Duryea some service in carrying out the proposed arrangement, for otherwise it cannot be explained how they got their \$19,000 of minority stock in connection with Duryea. They contributed no part of the money, which Sternbergh furnished. The latter was the moneyed man of the four and it was arranged that he contribute \$25,000 to a proposed company of \$100,000 capital. For this he was to receive 510 shares, the majority of full paid shares of \$100 each. Duryea was to contribute the patents and was to receive ten thousand in cash to enable him to get the patent licenses from the Illinois Company, 300 shares of full paid stock and employment at \$3,000 per year. Mulholland and Crowther were to get 190 shares of full paid stock. All parties were to assign to the company inventions made by them. From this it is clear that the substance of the arrangement was that the patents were capital-  
156 ized at \$85,000. Sternbergh furnished \$10,000 in cash by which licenses could be obtained from the Illinois Company, and his \$15,000 constituted the working capital of the proposed company. For this Sternbergh obtained the majority stock and Duryea the minority, which for some, to him presumably sufficient, reason he divided between himself, Mulholland and Crowther. The papers were drafted and the proceedings had in furtherance of this general plan. The agreement between the four was entered into February 13, 1900, in pursuance thereof the Duryea Power Company, the bankrupt was chartered on April 6, 1900, with a capital of \$1,000. On April 20, 1900, that company voted to increase its capital stock to \$100,000, and evidently deferred making return of such increase until the patents were assured. On June 11th, 1900,

Duryea and the Duryea Manufacturing Company of Peoria, Illinois, entered into an agreement with the Duryea Power Company of Reading, Pa., to license under the patent, in consideration of the payment of the \$10,000 to the Peoria Company and the stock to Duryea. On October 29, 1900, the return of the vote to increase stock was sworn to; on October 31st, it was accepted and filed in the office of the Secretary of the State where it has remained unquestioned; on October 27, 1900, a certificate for 510 shares of full paid stock was issued to Sternbergh in pursuance of a resolution of the Duryea Power Company of April 20th, 1900. Under these facts is Sternbergh liable for further payments on his stock. On this company becoming bankrupt its trustee acquired no higher rights than the bankrupt possessed; *Hussey v. New Kensington Bank*, 124 Fed. Rep., 968; *Davis v. Crompton*, 158 Fed. Rep., 735—and it is clear that company had no right of action against Sternbergh. Under the Pennsylvania Act of April 29, 1874, Sec. 96, "Every corporation created under the provision of this Act, or accepting its provisions, may take such \* \* \* patent rights

\* \* \* as is necessary for the purpose of its \* \* \*

157 business, and issue stock to the amount of the value thereof, in payment thereof, and the stock so issued shall be declared and taken to be full paid stock, and not liable to any further calls or assessments." Having taken these patents at a valuation to which every person interest-agreed and having enjoyed them for all these years while they were running, it is clear this company cannot question or repudiate the transaction and assess or collect on the full paid stock which it issued for them. This is not the case of an uncollected or unpaid assessment or of a subscription. It is an indirect attempt to invalidate an executed transaction, which has stood unchallenged and ratified by six years' acquiescence and enjoyment of the consideration paid therefor. If now open to attack the only ground in fact on which it could be done is that the patents were not worth the \$85,000 at which they were taken, but of this there is no evidence. Duryea testified of their value up to \$40,000; that his prior price for them was \$100,000, and the referee sustained an objection to the petitioner's question which sought to show by Duryea they were worth in excess of \$40,000. Presumably that objection would not have been made by his counsel unless his answer would have disclosed that fact. Nor was the return made to the State Department that "the capital stock of said company had been increased from \$1,000 to \$100,000, said additional stock being issued for cash and property," either untrue or misleading. Patents are personal property, *Shaw v. New Bedford*, 19 Fed. Rep., 753, and were aptly returned and described as property. A large number of returns printed in petitioner's brief shows the return in this case is substantially in the form followed by the Pennsylvania Bar. And in view of the absence of bad faith and fraud and of the acceptance, without objection, of this return by the Department, we see nothing to warrant our challenging its sufficiency. Holding these views, we are of opinion Sternbergh was not in-

158 debted to the bankrupt company on his stock and the ref-

eree should have allowed him to prove his claim. The order of the court approving the action of the referee will be reversed and the case remanded with instructions to allow the petitioner to do so. In view of the fact, however, that no allegation is made against the trustee, we see no reason why, at this late day, the selection of it should be disturbed.

159 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1908.

No. 19.

HENRY M. STERNBERGH, Petitioner,  
versus  
DURYEA POWER COMPANY, Appellee.

*Petition for Review.*

From the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the order of the said District Court in this Cause, be, and the same is hereby reversed with costs.

And it is further ordered that this cause be remanded to the said District Court with directions to allow the petitioner to prove his claim.

Philadelphia May 12, 1908.

GEO. M. DALLAS,  
*Circuit Judge.*

(Indorsed:) No. 19. March Term 1908. U. S. Circuit Court of Appeals for the Third Circuit. Henry M. Sternbergh, Petitioner, versus Duryea Power Company, Appellee. Order reversing District Court. Entered and filed May 12, 1908. Wm. H. Merrick, Clerk.

160 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1908.

No. 19.

HERBERT M. STERNBERGH, Petitioner,  
vs.  
THE DURYEA POWER COMPANY, Bankrupt, Appellee.

The above named appellee, through the Berks County Trust Company, trustee in bankruptcy of the Duryea Power Company, conceiving itself aggrieved by the order entered on May 12, 1908, in the

above entitled proceeding, doth hereby appeal from the said order to the Supreme Court of the United States, and it prays that this appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

GEO. W. WAGNER,  
E. C. BRANDENBURG,  
*Attorneys for Appellee.*

Appeal allowed and bond fixed in the sum of five hundred dollars. In my opinion the determination of the questions involved herein is essential to a uniform construction of the bankruptcy act throughout the United States.

June 9, 1908.

DAVID J. BREWER,  
*Associate Justice Supreme Court of the United States.*

(Indorsed:) In the matter of the Duryea Power Co., Bankrupt. Duryea Power Co., Bankrupt by its Trustee, the Berks County Trust Co., appellant, v. Herbert M. Sternbergh, appellee. 1. Petition for appeal. 2. Allowance of appeal. E. C. Brandenburg, Geo. W. Wagner, Att'ys, for the Berks County Trust Co. Trustee of Duryea Power Co., Bankrupt.

161 In the Supreme Court of the United States, October Term, 1908.

In the Matter of THE DURYEA POWER COMPANY, Bankrupt.

THE DURYEA POWER COMPANY, Bankrupt, by Its Trustee, THE BERKS COUNTY TRUST COMPANY, Appellant,

vs.

HENRY M. STERNBERGH, Appellee.

And now comes the Duryea Power Company, Bankrupt, by its Trustee, The Berks County Trust Company, and files the following Assignments of Error, upon which it will rely upon its Appeal from the judgment of the United States Circuit Court of Appeals for the Third Circuit in the above entitled case being a certain Order and Decree entered therein on May 12, 1908, on the Claim of Herbert M. Sternbergh, an alleged creditor of said Bankrupt estate:

The Appellant assigns as error the following:—

1. The Circuit Court of Appeals erred in finding that there was no question of good faith involved in the transaction between the organizers and incorporators of the Duryea Power Company, Bankrupt, in the organization and incorporation of said Company, and the increase of the Capital Stock of said Company from \$1000.00 to \$100000.00 as bearing upon the question of the right of Herbert M. Sternbergh to prove his claim in said bankrupt estate for \$14438.86. The Appellant avers that a question of good faith is involved in the transaction of the organization of Duryea Power Company, as

between the organizers and incorporators thereof and the present creditors of the Duryea Power Company, Bankrupt.

2. The said Court erred in finding that Duryea and the Duryea Manufacturing Company of Peoria, Illinois, had some patents, which the four parties, to wit: Duryea, Sternbergh, Mil-  
162 holland and Crowther, contemplated acquiring as individuals with a view of making Auto Freight Trucks at Reading. The testimony in the case shows that the intent and purpose was not that the four parties as individuals acquire any right, title and interest in the patents, but that the same be transferred by the said Duryea and the Duryea Manufacturing Company to the newly organized and incorporated Duryea Power Company, of which company the four parties were the organizers; and that only as Stock-holders of said Duryea Power Company were they to obtain any rights to the said patents.

3. The Court erred in presuming and finding that Milholland and Crowthers, as individuals, had some interest in the patents, or rendered some service to Charles E. Duryea for the purpose of carrying out the aforesaid proposed arrangement, as found by the Circuit Court of Appeals. The testimony shows that Milholland and Crowther, as individuals, had never acquired any interest in said patents, but only as Stock-holders of the said corporation, the Duryea Power Company; that they were to be the active men of the corporation, and that the shares given to them were given, not by Duryea but by the Duryea Power Company without consideration, and for the reason that Milholland and Crowther expected to be active men in the proposed corporation. That they were then bound by agreement to transfer any patents that they might invent during the life of the corporation for the same reason that Charles E. Duryea and the others were bound in a similar manner, to wit: the testimony shows that neither Milholland nor Crowther paid or contributed any money, or property, or value to the corporation for their shares.

4. The Court erred in finding that from the papers and testimony submitted in evidence in this case before the Referee, that the substance of the arrangement between the parties, who were the  
163 organizers and incorporators of the Duryea Power Company, was that the patents were capitalized at \$85000.00, which with \$15000.00 of the money contributed by Sternbergh was agreed by the parties should constitute the \$100000.00 Stock of said Company. The testimony in the case shows that they were put into the corporation at only \$40000.00, were conveyed to the Duryea Power Company in consideration of \$10000.00 in cash, and \$30000.00 of Stock, their actual value as found by the Referee, and as confirmed by the findings of the District Court upon Review.

5. The Court erred in finding that Sternbergh furnished \$15000.00 to constitute the working capital of the proposed Company; Charles E. Duryea the patents, which were to be valued at \$85000.00, and that for this Sternbergh was to receive for his contribution the majority of the stock, and Duryea the minority of the Stock; that such an arrangement and agreement existed between them, and which minority Stock said Duryea then divided between

himself, Milholland and Crowthers, and that the papers were drafted and the proceedings had in pursuance of that general plan.

6. The Court erred in finding that upon the Duryea Power Company becoming bankrupt its Trustee, as representative of the creditors of the said bankrupt company, acquired no higher rights than the bankrupt itself possessed prior to the time that it became insolvent and bankrupt.

7. The Court erred in finding that the patents in question were taken by the corporation at a valuation of \$85000.00, to which value every party interested had agreed. The testimony shows that the corporation took the patents, not at a valuation of \$85000.00, but at a valuation of \$40000.00, and no more.

8. The Court erred in finding that the acquisition by  
164 Sternbergh of the \$5100.00 par of the Duryea Power Company, as testified in this case, was not a subscription.

9. The Court erred in not finding that Sternbergh had paid only \$25000.00 to the corporation on account of this subscription of \$51000.00.

10. The Court erred in finding that the patents in question were worth \$85000.00; the testimony and agreement in this case, together with the findings of the Referee, and the District Court, showing that they were worth only \$40000.00.

11. The Court erred in finding that the Return made to the State Department of Pennsylvania on October 29, 1900, after the Capital Stock of said Company had been increased from \$1000.00 to \$100000.00, was not untrue and misleading.

12. The Court erred in finding that Sternbergh was not indebted to the Trustee of the Duryea Power Company, Bankrupt, for the benefit of the creditors of said bankrupt for unpaid subscription to said Stock.

13. The Court erred in reversing the findings of fact of the Referee and the District Court in that the said Sternbergh was indebted to The Berks County Trust Company, Trustee of the Duryea Power Company, Bankrupt, for the benefit of the creditors of said bankrupt the sum of \$26000.00.

14. The Court erred in reversing the finding of fact of the Referee and the District Court. The matter had come before the Circuit Court of Appeals by a petition for Revision under Section 24 B, of the Bankruptcy Act, upon matters of law.

15. The Circuit Court of Appeals erred in not accepting the facts  
165 as found by the Referee and the District Court, and deciding the questions at issue as to matters of law upon the facts as found by the Referee, and the District Court.

16. The Court erred in entering the Decree of May 12, 1908, which is as follows: "On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby reversed with costs, and it is further ordered that this cause be remanded to the said District Court, with directions to allow the petitioner to prove his claim."

17. The Court erred in finding that the facts in the case were not



in dispute, and in then finding the facts thereof the opposite as found by the Referee and the District Court.

18. The Court erred in finding that the Return to the State Department of Pennsylvania of the increase of Capital Stock of the Duryea Power Company of October 29, 1900, was a sufficient Return.

19. The Court erred in not dismissing the petition of Herbert M. Sternbergh praying that the order of the District Court, "In confirming the order of the Referee, in refusing to allow the claim of Herbert M. Sternbergh for \$14438.86 to be filed for voting upon the election of Trustee" be reversed in matters of law by the Circuit Court of Appeals, as provided in Section 24 B. of the Bankruptcy Law of 1898, and the rules and practices in such cases made and provided, in that said Court had no jurisdiction of said matters by petition for review under Sec. 24 B. of said Bankruptcy Act. Said proceeding should have been by Appeal under Section 25 of said Bankruptcy Act of 1898.

E. C. BRANDENBURG,  
GEO. W. WAGNER,

*Attorneys for The Berks County Trust Company,  
Trustee of Duryea Power Company, Bankrupt.*

166 (Indorsed:) In the matter of Duryea Power Co., Bankrupt. Duryea Power Co., Bankrupt by its Trustee, the Berks County Trust Company, Appellant, vs. Herbert M. Sternbergh, Appellee, Appellant's Assignments of Error. E. C. Brandenburg, Geo. W. Wagner, Att'ys for the Berks County Trust Co., Trustee &c. Filed, June 11, 1908.

167 Know all men by these presents, That we, The Duryea Power Company, bankrupt, by The Berks County Trust Company, its trustee, as principal, and The United States Fidelity & Guaranty Company, as sureties, are held and firmly bound unto Herbert M. Sternbergh in the full and just sum of Five hundred dollars, to be paid to the said Herbert M. Sternbergh certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this eighth day of June, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a term of the Circuit Court of Appeals for the Third Circuit in a suit depending in said Court, between the Duryea Power Company bankrupt, by its trustee The Berks County Trust Company, appellant here, and Herbert M. Sternbergh, Appellee here a decree was rendered against the said Duryea Power Company, bankrupt, and the said Duryea Power Company, bankrupt, by its trustee The Berks County Trust Company having obtained an order allowing an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Herbert M. Sternbergh citing and admonishing him to be and appear at a Supreme Court of the



United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Duryea Power Company, bankrupt, by its trustee The Berks County Trust Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make it-plea good, then the above obligation to be void; else to remain in full force and virtue.

**THE DURYEA POWER COM-**

**PANY, Bankrupt,**

**By THE BERKS COUNTY TRUST COM-**

**PANY, Trustee.**

**C. H. RUHL, Pres't.** [SEAL.]

**M. A. GHERST, Secretary** [SEAL.]

**THE UNITED STATES FIDELITY &**

**GUARANTY COMPANY.** [SEAL.]

**By HENRY H. SHOMO,**

*Their Attorney in Fact.*

Scaled and delivered in presence of:

**HATTIE M. MANDERBACH.**

**C. E. ISWALD.**

Approved by

**DAVID J. BREWER,**

*Associate Justice of the Supreme Court of the United States.*

168 UNITED STATES OF AMERICA, ss:

To Herbert M. Sternbergh, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the U. S. Circuit Court of Appeals for the Third Circuit wherein Duryea Power Company, bankrupt, by its trustee, The Berks County Trust Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, this 9th day of June, in the year of our Lord one thousand nine hundred and eight.

**DAVID J. BREWER,**

*Associate Justice of the Supreme Court of the United States.*

June 10, 1908. I hereby accept service of within citation.

**CYRUS G. DERR,**

*Att'y for Herbert M. Sternbergh.*

169 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1908.

No. 19.

HERBERT M. STERNBERGH, Petitioner,

VS.

DURYEA POWER COMPANY, Bankrupt, Appellee.

Sur Petition of Herbert M. Sternbergh for Revision in Matters of Law of the Order of the District Court for the Eastern District of Pennsylvania, Affirming the Action of the Referee on Questions Certified for Review.

To the Honorable the Judges of said United States Circuit Court of Appeals for said Third Circuit:

The petition of the Duryea Power Company, bankrupt, by its trustee, the Berks County Trust Company, respectfully represents:

That your honorable court in aforesaid case filed its opinion on May 8, 1908, and its decree on May 12, 1908, in which your honorable court entered the following decree:

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this case, be, and the same is hereby, reversed with costs, and it is further ordered that this case be remanded to the said District Court with directions to allow the petitioner to prove his claim.

Your petitioner further represents that on June 9, 1908, it presented its petition to the Honorable Justice Brewer of the United States Supreme Court, praying that an appeal be allowed in the aforesaid case to the Supreme Court of the United States, and that a transcript of record, proceedings and papers upon which said order was made, duly authenticated, be sent to the Supreme Court of the United States.

That said appeal was on said date, June 9, 1908, granted by the said Honorable David J. Brewer, Associated Justice of the Supreme Court of the United States, and that said petition for Appeal, together with the order endorsed thereon allowing said appeal

170 and the bond as approved by the said Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, were filed in the office of the Circuit Court of Appeals for the Third Circuit on June 11, 1908.

Your petitioner, therefore respectfully prays your Honorable Court to file with the Decree, so as aforesaid rendered on May 12, 1908, its findings of fact and its conclusions of law thereon, stated separately, in accordance with General Orders in Bankruptcy, No. XXXVI (3), so that the same may be certified to the Supreme Court of the United States by the Clerk of the Circuit Court of Appeals, together with the other papers in said record.

And it will ever pray.

THE BERKS COUNTY TRUST COMPANY,

*Trustee,*

By M. A. GHERST, *Secretary.*

STATE OF PENNSYLVANIA,  
*County of Berks, ss:*

M. A. Gherst, being duly sworn, according to law, doth depose and say that he is the secretary of The Berks County Trust Company, trustee, Bankruptcy of the Duryea Power Company, and that the facts contained in the foregoing petition are true and correct to the best of his knowledge, information and belief.

M. A. GHERST.

Sworn and subscribed to before me this 12th day of June, A. D. 1908.

[SEAL.]

SUE E. CONNER,  
*Notary Public.*

My commission expires January 21, 1911.

(Indorsed:) No. 19 March Term 1908. Herbert M. Sternbergh, Petitioner, vs. The Duryea Power Co., Bankrupt, Appellee. Petition for filing of findings of facts and law. Geo. W. Wagner A. A. Leiser, Att'ys for The Berks Co. Trust Co. Trustee &c. Filed June 13, 1908. Wm. H. Merrick, Clerk.

171 UNITED STATES OF AMERICA, *set:*

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify that the foregoing pages from one to one hundred and seventy inclusive to contain a full, true, complete and faithful copy of the original transcript of record and proceedings in the case of the Duryea Power Company, Bankrupt, by its trustee, the Berks County Trust Company, Appellant, and Herbert M. Sternbergh, Appellee, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia this ninth day of July in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,  
*Clerk U. S. Circuit Court of Appeals, Third Circuit.*

172 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1908.

No. 19.

HERBERT M. STERNBERGH, Petitioner,  
vs.  
DURYEA POWER Co., Bankrupt, Respondent.

Coram Dallas, Gray and Buffington, JJ.

*Findings of Facts.*

The bankrupt, the Duryea Power Company, was incorporated April 6, 1900, by the State of Pennsylvania with a capital stock of \$1000. On April 20, 1900, it voted to increase its capital stock to 1000 shares or \$100,000., "said additional stock being issued for cash and property." Return of such increase was duly made to the Secretary of the Commonwealth of Pennsylvania on October 31, 1900, pursuant to the recognized practice of the bar and the Department of State of Pennsylvania; such return has never been questioned or challenged. No other persons save Messrs. Sternbergh, Duryea, Mulholland and Crowther, the stockholders in said company as originally formed and increased were interested in said company and no question is here involved of any outside party buying stock therein. The company was chartered and the stock issued and divided in pursuance of an understanding between said four persons. Duryea and the Duryea Manufacturing Company of Peoria, Illinois, has some patents which the four parties named contemplated acquiring with a view of making auto-freight trucks at Reading, Pennsylvania. To obtain licenses so to do under said patents it was necessary for Duryea to pay to the Illinois Company \$10,000. In carrying out the plans of the parties neither Mulholland, Crowther or Duryea contributed any part of the money required. It

173 was furnished by Sternbergh alone. It was arranged that he contribute \$25,000., to a proposed company of \$100,000., capital. For this he was to receive 510 shares the majority, in full paid shares of \$100., each. Duryea was to contribute the patents and was to receive \$10,000., in cash, of the money contributed by Sternbergh, to enable him to procure the patent licenses from the Illinois Company, 300 shares of the full paid stock and employment at \$3000., per year and Mulholland and Crowther got 190 shares of this stock. All four parties were to assign to the Company any invention made by them. The substance and effect of the agreement thus consummated was that the patents thus furnished to the Pennsylvania Company were capitalized at \$85,000., and Sternbergh's \$15,000., the part of the \$25,000., he paid over and above the \$10,000., he furnished to enable Duryea to get the patent licenses from the Illinois Company, constituted the working capital of the company. Its capital stock represented patent property \$85,000.;

cash \$15,000. The stock issued to all four was full paid and non-assessable. The Duryea Power Company used the patents for some years until it went into bankruptcy and never repudiated or questioned the arrangement under which it acquired them. The transaction between the four men and the company were carried out and acted upon by all parties in entire good faith.

*Conclusions of Law.*

1. Patents are personal property and under the Pennsylvania Act of 29th April, 1874, the Duryea Power Company could "take such patent rights as is necessary for the purpose of its business and issue stock to its value thereof, in payment thereof, and the stock so issued shall be declared and taken to be full paid stock, and not liable to any further calls for assessments."

174 2. The stock of said company issued to Sternbergh in this case was full paid and non-assessable.

3. The Duryea Power Company at the time of its bankruptcy had no claim against Sternbergh for further or other assessments or calls on him upon said stock.

4. Its trustee in bankruptcy took no higher rights than the Duryea Power Company had.

5. Sternbergh was not indebted to the Duryea Power Company when it was adjudged bankrupt and being its creditor was entitled to prove his claim against it.

6. The referee and court below erred in denying Sternbergh the right to prove his claim.

175 UNITED STATES OF AMERICA,  
*Eastern District of Pennsylvania,*  
*Third Judicial Circuit, act:*

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original Statement of Facts filed July 14, A. D. 1908, in the case of Herbert M. Sternbergh, Petitioner, and Duryea Power Company, Bankrupt, Appellee, No. 19, March Term, 1908, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this eleventh day of September in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States the one hundred and thirty-third.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,  
*Clerk U. S. Circuit Court of Appeals, Third Circuit.*

176 [Endorsed:] 466-21262. No. 19. March Term, 1908. United States Circuit Court of Appeals, Third Circuit. Herbert M. Sternbergh, Petitioner, vs. Duryea Power Company, Bankrupt, Appellee. Certified Copy of Statement of Facts.

177 [Endorsed:] File No. 21,262. Supreme Court U. S. October Term, 1908. Term No. 466. Duryea Power Co., a Bankrupt, &c., App't, vs. Herbert M. Sternbergh. Certified copy statement of facts & conclusions of law ordered to stand as a return to Writ of Certiorari. Filed March 8th, 1909.

Endorsed on cover: File No. 21,262. U. S. circuit court of appeals, 3d circuit. Term No. 200. Duryea Power Company, bankrupt, by its trustee, The Berks County Trust Company, appellant, vs. Herbert M. Sternbergh. Filed July 15th, 1908. File No. 21,262.

Office Supreme Court, U. S.  
FILED.

OCT 14 1910

JAMES H. MCKENNEY,

IN THE  
Supreme Court of the United States.

1910  
October Term, 1909.

DURYEA POWER COMPANY, bankrupt,  
by its Trustee, THE BERKS COUNTY  
TRUST COMPANY, Appellant,

v.

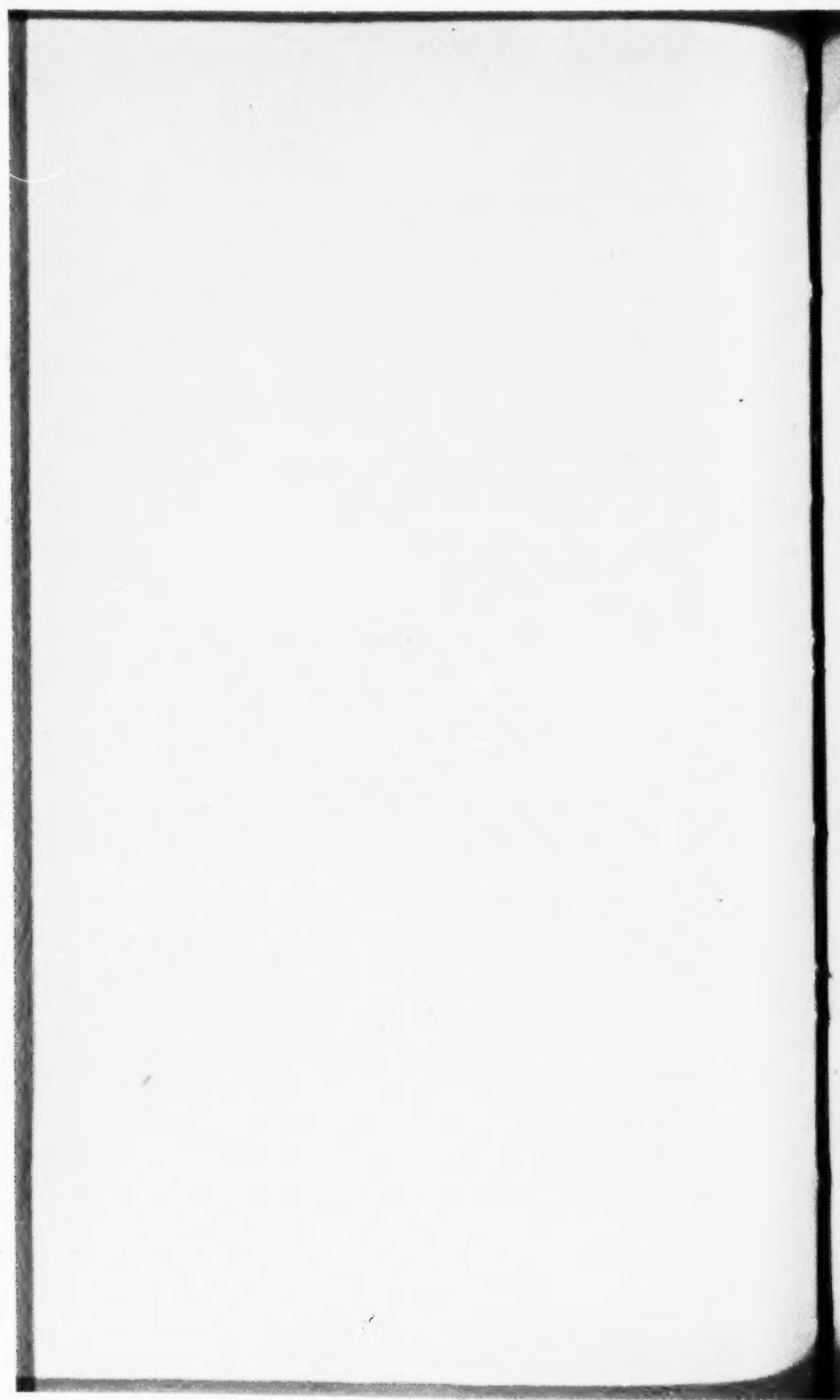
HERBERT M. STERNBERGH.

No. 200.29

BRIEF OF APPELLANT.

EDWIN C. BRANDENBURG,  
CLARENCE A. BRANDENBURG,  
F. WALTER BRANDENBURG,  
*Attorneys for Appellant.*

ANDREW A. LEISER,  
THOMAS K. LEIDY,  
*Of Counsel.*





IN THE  
**Supreme Court of the United States.**

October Term, <sup>1910</sup>1909.

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DURYEY POWER COMPANY, bankrupt,  
by its Trustee, THE BERKS COUNTY  
TRUST COMPANY, *Appellant*,  
v.  
HERBERT M. STERNBERGH. } No. 200. 29

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**BRIEF OF APPELLANT.**

**Statement.**

This is an appeal from the decision of the Circuit Court of Appeals for the Third Circuit, which reversed the order of the court of bankruptcy approving the action of the referee in disallowing a claim of \$14,438.86 held by appellee.

At the outset it is proper to admit that the record on this appeal undoubtedly contains much that is irrelevant and which can not be considered under the rules governing appeals to this court in bankruptcy matters. The explanation of this prolixity of the record is that the Circuit Court of Appeals at the time of filing its opinion and entering its decree, failed to file its findings of fact and conclusions of law, as required by General Orders XXXVI (3), and owing to the limited time within which the appeal could be perfected, it became necessary to use the record on appeal in that court. This was subsequently

supplemented by findings of fact and conclusions of law filed by the Circuit Court of Appeals pursuant to a petition of appellant, praying that it file the same with its decree theretofore rendered, that court having in the meantime adjourned, and there being no opportunity to eliminate the irrelevant matter therefrom.

With the view of remedying this defect, counsel for appellant will endeavor to so state and present the case as to relieve the court from the necessity of an examination of any irrelevant matter.

The appellant was adjudged a bankrupt in involuntary proceedings instituted in the District Court of the United States for the Eastern District of Pennsylvania, and the cause was referred to a referee in due course.

At the first meeting of creditors, held before the referee, appellee presented a claim in the sum of \$14,438.86, based upon certain notes (R. p. 8) of which he was the accommodation maker for the bankrupt, the proceeds of which were received by the bankrupt and which appellee was required to pay. Upon presentation of the claim objection was made thereto on the ground that Sternbergh, appellee, was indebted to the bankrupt corporation in the sum of \$26,000, being the unpaid balance due on \$51,000 par value of the capital stock subscribed for by and issued to him by said company, and that the claim could not be allowed until the amount due the bankrupt on the stock had been paid into the company for the benefit of its creditors (R. p. 10). A protracted and vigorous contest thereupon ensued, at the conclusion of which the referee filed certain findings of fact and conclusions of law (R. pp. 72-74), finding and holding that the transaction as evidenced by various agreements (R. pp. 24-26) did not establish full payment by the appellee for the 510 shares of stock issued to him, as all that was paid by appellee therefor was \$25,000, in the aggregate in cash,

and that he owned no patents and that he never conveyed any other property of any kind to the company for the stock (R. pp. 72, 73).

The referee thereupon declined to allow appellee's claim, on the ground that he was indebted to the corporation, bankrupt, in the sum of \$26,000, the balance due upon the five hundred and ten (510) shares of stock of the par value of \$100 each, issued to him, and upon application certified this ruling to the court of bankruptcy as required by law (R. pp. 3-5).

The matter then came on for hearing before Judge McPherson in the district court, who upon said certificate of the referee, held that appellee was indebted to the bankrupt corporation for an unpaid stock subscription in the sum of \$26,000, and affirmed the referee's action (R. pp. 124-128).

A petition was then filed by appellee in the Circuit Court of Appeals for the Third Circuit, praying that the decision of the district judge in confirming the action of the referee be *revised in matter of law, pursuant to section 24b* of the bankruptcy law and the rules and practice in such cases made and provided (R. pp. 129, 130). The case coming on for hearing in the Circuit Court of Appeals, the decision of the court below was reversed (R. pp. 131-134).

The appellant then prayed an appeal to this court (R. p. 134), which was allowed by Mr. Justice Brewer (R. p. 135) and certain assignments of error were filed (R. p. 135-138).

Upon petition of the appellant, findings of fact and conclusions of law, stated separately, were made and filed by the Circuit Court of Appeals *nunc pro tunc*, as of the date of its decree (R. p. 142, 143).

As to the assignments of error originally filed, all are abandoned except those numbered 12, 13, 14, 15, 16, and

19, as hereinafter set forth, and the case will be submitted upon those assignments and five others which will be numbered, viz: 20, 21, 22, 23, and 24.

### **ASSIGNMENTS OF ERROR.**

12. The court erred in finding that Sternbergh was not indebted to the trustee of the Duryea Power Company, bankrupt, for the benefit of the creditors of said bankrupt for unpaid subscription to said stock.

13. The court erred in reversing the findings of fact of the referee and the district court that the said Sternbergh was indebted to the Berks County Trust Company, trustee of the Duryea Power Company, bankrupt, for the benefit of the creditors of said bankrupt in the sum of \$26,000.

14. The court erred in reversing the finding of fact of the referee and the district court, as the matter had come before the Circuit Court of Appeals by a petition for revision under section 24b of the Bankruptcy Law, upon matters of law.

15. The court erred in not accepting the facts as found by the referee and the district court, and in not deciding the questions at issue as to matters of law upon the facts as found by the referee and the district court.

16. The court erred in entering the decree of May 12, 1908, which is as follows: "On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said district court in this cause, be, and the same is hereby reversed with costs, and it is further ordered that this cause be remanded to said district court, with directions to allow the petitioner to prove his claim."

19. The court erred in not dismissing the petition of Herbert M. Sternbergh praying that the order of the district court, "In confirming the order of the referee, in refusing to allow the claim of Herbert M. Sternbergh for \$14,438.86 to be filed for voting upon the election of

trustee" be reversed in matters of law by the Circuit Court of Appeals, as provided in section 24b of the Bankruptcy Law of 1898, and the rules and practices in such cases made and provided, in that said court had no jurisdiction of said matters by petition for review under section 24b of said Bankruptcy Act. Said proceedings should have been by appeal under section 25 of said Bankruptcy Act of 1898.

20. The court erred in holding as a conclusion of law that the stock owned by Sternbergh was fully paid and non-assessable.

21. The court erred in holding that at the time of the bankruptcy of the Duryea Power Company, Sternbergh was not liable to an assessment for such stock as was received by him in excess of the amount for which he actually paid.

22. The court erred in holding that Sternbergh was not indebted to the Duryea Power Company, or its trustee in bankruptcy, at the time he attempted to prove his claim.

23. The court erred in holding that Sternbergh was authorized under the law to prove his claim in the bankruptcy proceedings in view of the fact that under the law he was liable for 260 shares of stock of the par value of \$100 each, for which he had given no consideration either in cash, services, property or otherwise.

24. The court erred in holding that the trustee in bankruptcy took no greater right than the Duryea Power Company had at the time of institution of proceedings so far as relates to the right to demand and recover the value of stock issued to Sternbergh for which no consideration whatever had been paid.

### **ARGUMENT.**

It will be observed that two questions, both very important to the uniform administration of the bank-

ruptcy law, arise on this appeal. The first is, what is the correct practice where the review of a decision of a district judge upon a referee's certificate is desired, and the question involved is the propriety of a ruling made by the referee disallowing a claim for voting purposes? Second: What constitutes full payment of stock in contemplation of the bankruptcy law, as against the trustee in bankruptcy representing creditors?

### **I. Jurisdiction.**

On the first proposition, counsel for appellant insists that the Circuit Court of Appeals was without jurisdiction to hear and determine the petition to review the decision of the district judge who refused to permit the claim to be proved, since the exclusive method of reviewing such matters is by an appeal under section 25 of the bankruptcy law and not by petition for review which was the method adopted.

If the cause could be heard by the Circuit Court of Appeals on such petition for review, it was bound by the findings of fact made by the referee, and could not, therefore, decide the questions of law involved upon a different state of facts than those found by the referee, as the Circuit Court of Appeals obviously did in the case at bar.

The appellant's contention concerning the lack of jurisdiction in the Circuit Court of Appeals divides itself into two propositions, viz:

(A) That because a petition of review was resorted to instead of an appeal, the Circuit Court of Appeals was without jurisdiction to review the order of the district judge.

(B) That if the petition of review can be construed as having conferred any jurisdiction upon the Circuit Court of Appeals, then that court was without power to disre-

gard or change the findings of fact made by the referee or the district judge, and had jurisdiction at the most to consider only such questions of law as arose upon the facts as found by the referee and district judge.

### **Review Should Be by Appeal.**

Appellant contends that the proper procedure for review of the action of the referee and the Court of Bankruptcy in sustaining the objection to the proof and allowance of appellee's claim, is by way of an appeal under section 25, and not by way of a petition, to superintend and revise in matter of law under section 24*b*, which is the course pursued in the case at bar. This question appears to have been considered in the case of *Coder v. Arts*, 213 U. S. 223, where the creditor in proving his claim joined with it a statement that he had security upon the estate, which it was his purpose to maintain and upon which he was entitled to priority in the distribution of the assets. The question of jurisdiction of the Circuit Court of Appeals and of this court was raised, and in considering the matter this court held that the action of the creditor in thus proving his claim was in effect to institute "a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings." It was insisted in that case that as no objection had been interposed by the trustee to the amount found due upon the notes, but the appeal only sought to further contest the right to the security, that the sole remedy was under section 24*b*, by way of a petition for review. This court, however, said (p. 236):

"But we are of opinion that the character of the proceeding must be determined by the nature of the claim set up against the trustee in bankruptcy, and as section 25*b* gives an appeal to the Court of Appeals from a judgment allowing or rejecting a debt or

claim of \$500 or over, that the appeal was properly allowed in this case, and brought before the Circuit Court of Appeals the validity of the claim and the lien asserted securing the debt."

The court thus inferentially if not directly holds that the proper method for review of the action of the lower court in allowing or rejecting a claim is by way of an appeal under section 25a.

In the case of *Holden v. Stratton*, 191 U. S. 115, 118, this court also held:

"The allowance or rejection of a debt or claim is a part of the bankruptcy proceedings, and not an independent suit \* \* \* the distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in §§ 23, 24 and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction."

*First National Bank v. Chicago T. & T. Co.* 198 U. S. 280, 288;

*Western Tie & T. Co. v. Brown*, 196 U. S. 502, 506.

In the case of *Mueller*, 135 Fed. 711, a motion to dismiss a petition for review was made upon the ground that the order or judgment sought to be reviewed was a judgment allowing a debt or claim of \$500, or over, and therefore not subject to be reviewed under the provisions of section 24b of the bankruptcy law, but reviewable only by appeal under section 25a. The Circuit Court of Appeals by Mr. Justice Lurton, quoting from *Holden v. Stratton*, *supra*, in granting the motion to dismiss, among other things said (p. 714):

"Thus section 25a provides for 'appeals as in equity cases,' if taken within 10 days: (1) From



a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; (3) from a judgment allowing or rejecting a debt or claim of \$500, or over."

\* \* \* \* \*

But whatever the reason, there is no way in which a judgment of the kind described by section 25a can be reviewed but by an appeal and an appeal sued out within 10 days."

To the same effect is the opinion of the Circuit Court of Appeals for the 9th Circuit in the case of *First Nat. Bank v. State Nat. Bank*, 131 Fed. 430, 433, where the court in considering the question of jurisdiction on appeal said:

"The general consensus of opinion is, that section 25a having provided a means to review by appeal three kinds of judgments, every other means is excluded."

To the same effect are the following:

*Cook, etc. Co. v. Caldwell*, 147 Fed. 475, 478;

*In re Worcester*, 102 Fed. 808, 811;

*In re Friend*, 134 Fed. 778, 781.

### **Court Controlled by Findings.**

If this court should hold that the Circuit Court of Appeals had jurisdiction upon the petition for review, then it is respectfully submitted that in passing upon the law that court was controlled by the findings of the referee as affirmed by the court of bankruptcy. By the certificate of the referee to the court of bankruptcy (R. pp. 3, 4), he has made a part thereof his findings of fact and conclusions of law with reference to appellee's claim, which are found on pages 72 and 73 of the record. These findings were affirmed by Judge McPherson, holding the court of bankruptcy (R. pp. 123-128).

Upon this proposition perhaps the latest ruling is that of this court in the case of *Coder v. Arts*, 213 U. S. 223, 233, where the court says:

“By paragraph *b* of § 24, the Circuit Courts of Appeals have jurisdiction to superintend and revise in matters of law, proceedings of the several inferior courts of bankruptcy within their jurisdiction. The proceeding under this section is designed to enable the Circuit Court of Appeals to review questions of law arising in bankruptcy proceedings, and is not intended as a substitute for the right of appeal upon controverted questions of fact under the right of appeal given in controversies arising in bankruptcy proceedings (§ 24), or the special appeal given in certain cases under § 25.”

That the Circuit Court of Appeals was bound by the findings of the referee and court below is also sustained by the following cases:

*Mueller v. Nugent*, 184 U. S. 19;  
*Elliott v. Toepfner*, 187 U. S. 327, 334;  
*First National Bank v. Chicago Title & Trust Co.*  
 198 U. S. 280, 291;  
*Kenova Loan & Trust Co. v. Graham*, 135 Fed.  
 717, 720;  
*In re Graessler*, 154 Fed. 478, 479.

According to the findings of fact made by the referee, Sternbergh, who received the stock, had no property or title in the patents or licenses, etc. (R. p. 72), nor was he the owner thereof (R. p. 73). He likewise found as follows:

“Five hundred and ten (510) shares of stock of the Duryea Power Company, par value one hundred dollars each; total value, fifty-one thousand dollars, were issued to Sternbergh on April 20, 1900, by the Duryea Power Company, of which he was president.

He paid for the stock twenty-five thousand dollars (\$25,000) and no more. He didn't turn over to the company any other property or rights of any kind. He received these shares as full paid, whereas they were not paid half. The stock was in that respect what is called watered stock. The Duryea Power Company by its officers reported to the State Department that its capital stock of one hundred thousand dollars was fully paid in cash or property, whereas, in fact, as far as Sternbergh is concerned, it was not paid to the extent of twenty-six thousand dollars on his shares."

Instead of adopting these findings the Circuit Court of Appeals among other things has found in lieu thereof the following:

"All four parties were to assign to the company any invention made by them. The substance and effect of the agreement thus consummated was that the patents thus furnished to the Pennsylvania Company were capitalized at \$85,000 and Sternberg's \$15,000, the part of the \$25,000 he paid over and above the \$10,000 he furnished to enable Duryea to get the patent licenses from the Illinois Company, constituted the working capital of the company. Its capital stock represented patent property, \$85,000; cash, \$15,000. The stock issued to all four was full paid and non-assessable. \* \* \* The transaction between the four men and the company were carried out and acted upon by all parties in entire good faith" (R. pp. 142, 143).

According to appellant's view this is not in accord with the finding of the referee, in that the money contributed by Sternbergh was to the corporation, and out of the money thus received by the corporation, \$10,000 was used to purchase the patents, it nowhere appearing that the patents were put in at \$85,000. The finding made by Circuit Court of Appeals is that "All four parties were to

assign to the Company any invention made by them," would at least indicate that Sternberg had some invention to transfer, and is quite inconsistent with the finding of the referee that "He didn't turn over to the company any other property or rights of any kind," except the \$25,000 (R. p. 73).

The finding of the Circuit Court of Appeals also is to the effect that "The stock issued to all four men was full paid and non-assessable" (R. p. 143), while the referee found that for the five hundred and ten (510) shares of stock of the par value of \$51,000 issued to Sternbergh he paid only \$25,000, and no more, and that "He received these shares as full paid, whereas they were not paid half. The stock was in that respect what is called watered stock" (R. p. 73).

The Circuit Court of Appeals also finds that "The transaction between the four men and the company was carried out and acted upon by all parties in entire good faith" (R. p. 143). While this may be true, as between the parties, the referee makes no such finding, but on the other hand finds that the creditors having extended credit to the corporation bankrupt on the strength of the returns to the State Department that the stock had been full paid "A technical fraud has been perpetrated against them and it seems to me that they should have the benefit of unpaid stock, represented to them as having been fully paid" (R. p. 73).

According to the findings of the Circuit Court of Appeals, "The company was chartered and the stock issued and divided in pursuance of an understanding between said four persons. Duryea and the Duryea Manufacturing Company of Peoria, Illinois, had some patents which the four parties named contemplated acquiring with a view of making auto-freight trucks at Reading, Pennsylvania" (R. p. 142). The referee found

"That the parties agreed to give certain things to the corporation to be formed, and not to themselves as common property, and that therefore, they do not have any property or title in these patents, licenses, etc., as individuals, but that the property, namely licenses, patents, etc., belonged first to Duryea and afterwards was to be turned over to the Duryea Power Company *by him*" (R. p. 72).

While it is insisted that the Circuit Court of Appeals on a petition for review is bound by the facts as found by the referee and affirmed by the court of bankruptcy, and should adopt such findings upon an appeal to this court, still we submit that the findings as made by the Court of Appeals, notwithstanding the inclusion of other matters not strictly in accord with the findings of the referee, present sufficient to fully support appellant's contention. This finding contains the following statement:

"The company was chartered and the stock issued and divided in pursuance of an understanding between said four persons. Duryea and the Duryea Manufacturing Company, of Peoria, Illinois, has some patents which the four parties named contemplated acquiring with a view of making auto-freight trucks at Reading, Pennsylvania. To obtain licenses so to do under said patents it was necessary for Duryea to pay to the Illinois company \$10,000. In carrying out the plans of the parties neither Mulholland, Crowther nor Duryea contributed any part of the money required. It was furnished by Sternbergh alone. *It was arranged that he contribute \$25,000 to a proposed company of \$100,000 capital. For this he was to receive 510 shares, the majority, in full paid shares of \$100 each.* Duryea was to contribute the patents and was to receive \$10,000 in cash, of the money contributed by Sternbergh, to enable him to procure the patent licenses from the Illinois company, 300 shares of the full paid stock and employment at \$3,000 per year; and Mulholland and

Crowther got 190 shares of this stock. All four parties were to assign to the company any invention made by them." (R. p. 142.)

While this finding states that all parties were to assign to the company any invention made by them, it fails to find that Sternbergh ever did assign to the company any invention of any kind or character, or that he owned any such, or indeed that he ever assigned or transferred to the company, for the 510 shares of stock, anything whatsoever save and except the \$25,000.

When the collateral matters are eliminated, the fact remains that the court finds that Sternbergh *received 510 shares of stock of the par value of \$100 each, for which he contributed \$25,000, and no more, either in money or property.* This being true, he became indebted to the creditors of the bankrupt corporation in the sum of \$26,000, the difference between the amount actually paid and the par value of the stock.

## II. STOCKHOLDERS' LIABILITY.

If the court shall be of opinion that the Circuit Court of Appeals had jurisdiction, then there is presented for consideration and determination an exceedingly important and far-reaching question, namely:

In determining whether stock is full paid, is the rule established in this court to prevail and be administered in bankruptcy proceedings uniformly without regard to State decisions, as an exercise of the power expressly derived from the Constitution of the United States in the Article providing for the enactment of general bankruptcy laws by Congress, or shall that important question depend for its solution upon the views of forty-six separate appellate State courts?

Upon this proposition, appellant relies upon two prin-

cial contentions. First: That the laws of the State of Pennsylvania on the subject do not in principle differ from the rule established by this court. Second: That if this view be not correct and there be a divergence between the rule in Pennsylvania and the rule in this court, then that the rule of this court in the administration of the bankruptcy law, emanating as it does directly from the Constitution, is the supreme law of the land, to which in bankruptcy cases the local interpretation must yield.

### **Pennsylvania Doctrine as to Liability.**

That the laws of the State of Pennsylvania with reference to liability for unpaid stock do not in principle differ from the rule as established by this court is supported by the weight of authority. It is quite true that under the laws of that State stock may be issued for property, but it is submitted that such fact plays no part in the case at bar, for the referee has found that for \$26,000 of the stock held by Sternbergh he gave no property of any kind; and this is borne out even by the much more liberal finding of the Circuit Court of Appeals. The only property appellee ever claimed to have conveyed to the bankrupt corporation for this \$26,000 of stock was patents, and the referee as well as the Court of Bankruptcy finds that he never had any to convey. This then presents the simple question of law as to liability on this unpaid stock. The courts of Pennsylvania in the interpretation of its statutes with reference to stockholders' liability are unequivocal in their declaration that the trust fund doctrine prevails.

"It is certainly an acknowledged principle that the entire capital stock of a corporation is a trust fund for payment of its debts. \* \* \* The unpaid subscriptions to its stock are a part of its assets, which can be made available in equity by the

creditors, and therefore a general assignment for their benefit passes them to the assignee."

*Germantown Pass. R. Co. v. Fitler*, 60 Pa. 124, 131.

That upon the insolvency of a moneyed corporation its uncalled and unpaid capital stock constitutes a trust fund for the benefit of all its creditors, and will be administered as such is also borne out by the following cases:

*Bunn's Appeal*, *Lane's Appeal*, 105 Pa. 49, 60;  
*Cook v. Carpenter*, *Lipper's Appeal*, 212 Pa. 165, 167;

*Bell's Appeal*, 115 Pa. 88, 93;

*Swearingen v. Sewickley Dairy Co.* 198 Pa. 68;

*Allibone v. Hager*, 46 Pa. 48, 52;

*Bavington v. Pbgh. & Steubenville R. R. Co.* 34 Pa. 358, 361;

*Robinson v. Pbgh. & Connellsville R. R. Co.* 32 Pa. 334-339;

*Graff v. Pbgh. & Steub. R. R. Co.* 31 Pa. 489, 498;

*Pbgh. & Steub. R. R. Co. v. Biggar*, 34 Pa. 455;

*Bedford R. R. Co. v. Bowser*, 48 Pa. 29;

*Real Estate Co. v. Riley*, 210 Pa. 283;

*Bailey v. Pbgh. Coal R. R. Co.* 139 Pa. 213, 217.

### **Subscription for Stock.**

It is not seen how any question can be raised in this case as to whether Sternbergh subscribed for the stock. The fact that the court finds that the stock was issued to him and was in his name was sufficient to constitute him a stockholder, and carried with it any liability that attached under the law.

*Upton v. Tribilcock*, 91 U. S. 45;

*Sanger v. Upton*, 91 U. S. 56;

*Handley v. Stutz*, 139 U. S. 417.



And this is equally true although the agreement to take the stock was prior to the organization of the corporation.

Bell's Appeal, 115 Pa. 88, 91.

### **Decisions of This Court Controlling.**

If, however, the court should be of opinion that a divergence exists between the Pennsylvania doctrine and that of this court on this subject, then appellant insists that the rule as laid down by this court must prevail for the reasons already stated.

It is submitted that the case at bar is an ideal one for the application of the just and salutary "trust fund" doctrine, so thoroughly established and so consonant with business integrity.

Coming now to consider the question whether, upon the conceded facts, Sternbergh's stock was full paid, it is proper to refer very briefly to that phase of the facts.

According to the findings of the Circuit Court of Appeals, the appellant contributed \$25,000 to a proposed company of \$100,000 capital, and "for this he was to receive 510 shares, the majority, in full-paid shares of \$100 each" (R. p. 142). While the finding likewise adds that "Duryea was to contribute the patents and was to receive \$10,000, in cash, of the money contributed by Sternbergh, to enable him to procure the patent licenses," etc., the fact remains that the \$25,000 was paid by the appellee to the company for the 510 shares of stock of the par value of \$51,000. The finding fails to show that appellee contributed any patents or any other property to the company for this stock. This finding is not quite consistent with, or as full as that of the referee who says "the parties agreed to give certain things to the corporation to be formed and not to themselves as common property," but the title to the patents belonged first to

Duryea and afterwards was to be turned over by him to the bankrupt corporation, and not to or through Sternbergh (R. p. 72).

The referee finds that for \$25,000 Sternbergh received 510 shares of stock of the par value of \$51,000, and that he paid for it no more money, gave no services and conveyed no property and that he had no such property as he agreed to give which he could have conveyed (R. p. 73).

An ingenious attempt will doubtless be made to obtain for Sternbergh some vicarious benefit from Duryea's conveyance of patent rights, but even the most casual examination of the agreement if that be permitted (R. pp. 24, 26) will demonstrate that no such idea was in the minds of the parties to those agreements, and that he had no interest or benefit therein is found as a fact by the referee (R. pp. 72, 73).

The agreements show that each of the four parties was to deal *separately* with the bankrupt and the recital that each was to convey all patent rights was merely to place all four on an *apparent* equality.

The whole argument in the opinion of the Circuit Court of Appeals is that, conceding that appellee paid but \$25,000, and gave no property or services, yet if the parties agreed that by the payment of \$25,000 and his mere *promise* to convey what the court below says every one knew he did not have, the appellee fully paid for his stock and this because the four persons who were dividing this stock among themselves simply agreed that each should receive a certain number of shares of "full paid" stock.

This court will hesitate to believe that any such doctrine prevails in the conservative State of Pennsylvania, and fortunately for its financial good name, no such doctrine as already shown does prevail.

Another contention which will doubtless be urged is that a trustee in bankruptcy, representing creditors, is

bound by any agreement dispensing with full payment of the stock which the bankrupt corporation may have seen fit to make and has no greater right to enforce the payment of the balance due than the bankrupt would have. This doctrine has been fully dealt with by this court and it has been shown that the trust impressed upon stock subscriptions, upon the insolvency of the corporation can not be defeated by any agreement between the corporation and the stockholder.

In the case of *Handley v. Stutz*, 139 U. S. 417, 427, this court said:

“ Ever since the case of *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation, that the stock shall be treated as fully paid and non-assessable, or otherwise limiting their liability therefor, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted.”

In the case of *Upton v. Tribilcock*, 91 U. S. 45, this court said:

“ The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and can not be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is foot-ball to be thrown into the

market for the purposes of speculation, that its value may be elevated or depressed, to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion, that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted but never successfully. The capital paid in, and promised to be paid in is a fund which the trustees can not squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received."

To the same effect are the following cases in this court:

*Sanger v. Upton*, 91 U. S. 56;  
*Sawyer v. Hoag*, 17 Wall. 610;  
*Scovill v. Thayer*, 105 U. S. 143;  
*Camden v. Stuart*, 144 U. S. 104;  
*Fogg v. Blair*, 139 U. S. 118.

### **Statute of Limitations.**

Attention perhaps should be called to one or two cases which negative a contention which will doubtless be made in respect to the application of the statute of limitations.

The doctrine in this court is that the statute does not begin to run until in some authoritative way a call has been made.

*Hawkins & Glenn*, 131 U. S. 319;  
*Glenn v. Liggett*, 135 U. S. 533;  
*Glenn v. Marbury*, 145 U. S. 499.

The same rule is adopted by the courts of Pennsylvania. Thus in the case of *Allibone v. Hager*, 46 Pa. 48, the court held that where the certificate of a company organized under the General Manufacturing Law of April

7, 1849 (now part of General Corporation Law of 1874), shows stock subscribed for but unpaid, a creditor of the company failing to obtain payment from the company, might recover against the stockholders individually, to the extent of the unpaid stock. And the defendants *could not plead the statute of limitations* either against the plaintiffs or against the company for calls upon the unpaid stock, though it had not been called in for eleven years.

In the case of *Cook, etc., assignees v. Carpenter*, 212 Pa. 165, 176, the court says:

“If the enterprise is successful and profitable from the start, or the provision for capital has been larger than actual needs require, the duty of payment is only a reserve duty for possible contingencies, and until they happen, either by calls by the corporation on the subscriptions, or *by the rights of creditors*, there is no duty of the subscriber to pay, no right of action against him for non-payment, and no starting point for the statute of limitations.”

To the same effect is the case of *Swearingen v. Sewickley Dairy Co.* 198 Pa. 68, 76.

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We submit that upon this record it clearly appears that whether the question be tested by the doctrine in Pennsylvania or by the doctrine established in this court, Sternbergh is a debtor to bankrupt corporation, to the extent of \$26,000.

The courts below agreed that if such indebtedness existed, Sternbergh had no right to prove his claim. That this position is correct is borne out by the authorities:

*In re Wiener & Goodman Shoe Co.* 96 Fed. 949  
(E. Dist. Pa.);

*In re Gerson*, 105 Fed. 893;

*In re Royce Dry Goods Co.* 133 Fed. 100.

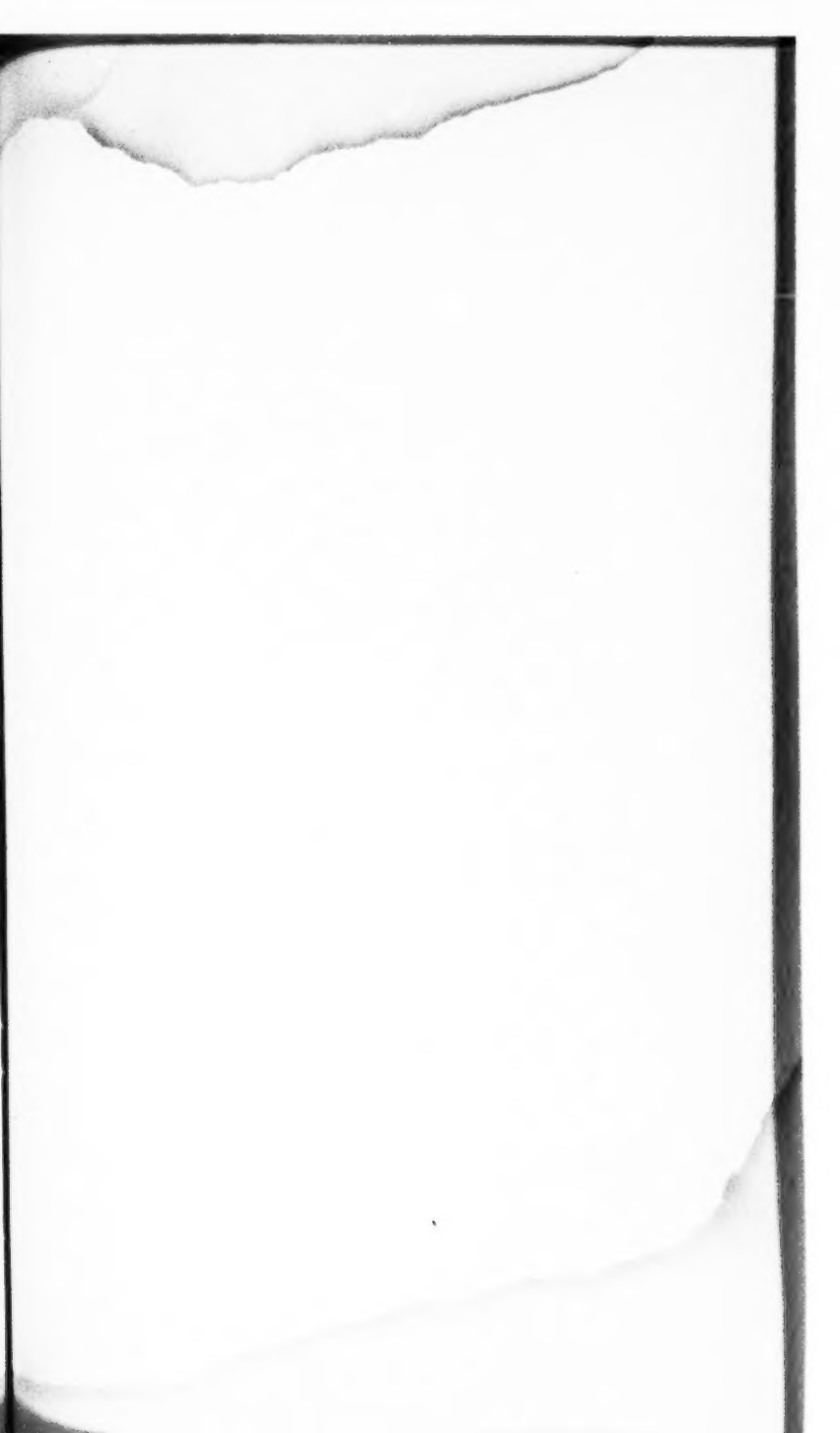
This being so, it inevitably follows that upon the whole case the decree below should be reversed, either for want of jurisdiction in the Circuit Court of Appeals, and remanded to that court with directions to dismiss the petition to review, for want of jurisdiction, or if this court deems it proper to consider the merits of the controversy, then the decree below should be reversed and the case remanded with directions to the Circuit Court of Appeals to affirm the decree of the District Court.

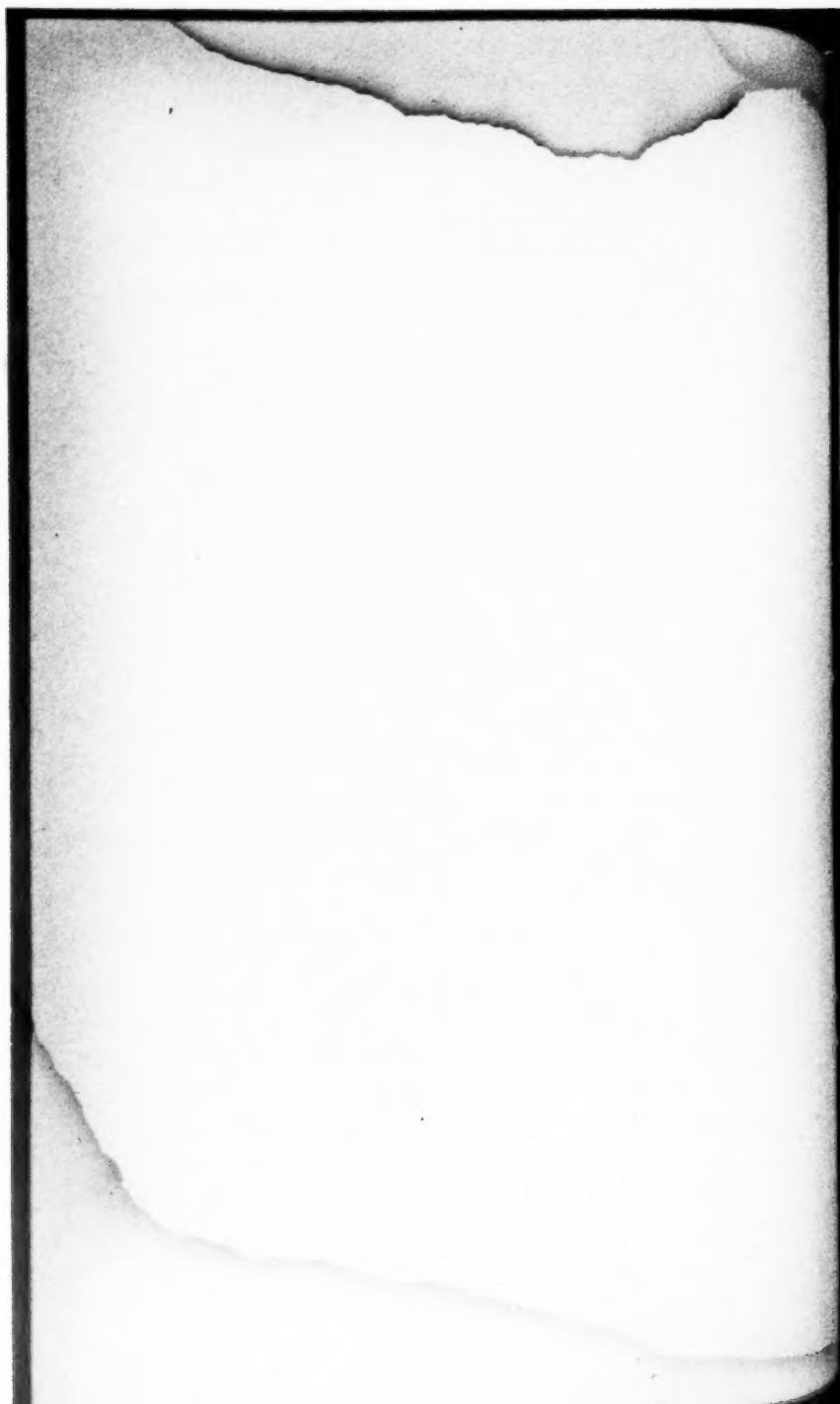
Respectfully submitted,

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U. S. Supreme Court, U. S.  
FILED.

OCT 24 1910

JAMES H. McKENNEY,

CLERK.

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1910.**

**No. 29.**

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**DURYEA POWER COMPANY, BANKRUPT,**  
by its Trustee, **THE BERKS COUNTY**  
**TRUST COMPANY, Appellant,**

*vs.*

**HERBERT M. STERNBERGH.**

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**APPEAL FROM THE UNITED STATES CIRCUIT COURT**  
**OF APPEALS FOR THE THIRD CIRCUIT.**

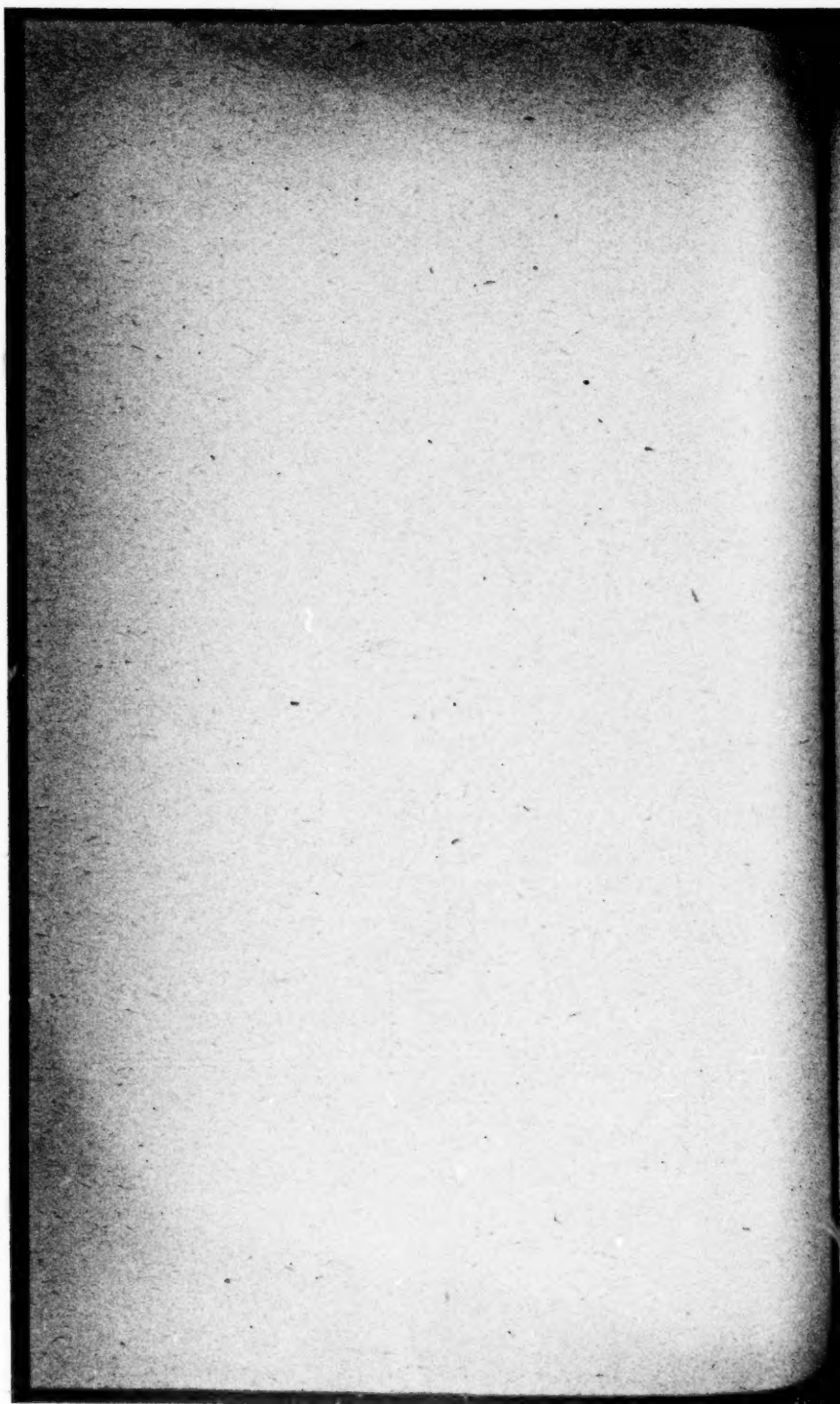
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**BRIEF FOR APPELLEE.**

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**JOHN G. JOHNSON,**  
**CYRUS G. DERR,**  
*Attorneys for Appellee.*

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**SUPREME COURT OF THE UNITED STATES.**

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**DURYEA POWER COMPANY, BANKRUPT,**  
by its Trustee, **THE BERKS COUNTY**  
**TRUST COMPANY, *Appellant,***

*vs.*

**HERBERT M. STERNBERGH.**

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**APPEAL FROM THE UNITED STATES CIRCUIT COURT**  
**OF APPEALS FOR THE THIRD CIRCUIT.**

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**BRIEF FOR APPELLEE.**

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**How the Controversy Arose.**

The creditors of the appellant bankrupt, in the selection of a Trustee, divided between two trust companies and waged a heated contest.

Mr. Sternbergh, the appellee, favored The Pennsylvania Trust Company, which had been in possession of the Duryea Power Company's assets for some months as Receiver appointed by the state court and already understood the affairs of the company.

Other creditors favored the Berks County Trust Company.

Mr. Sternbergh, appellee, objected to the voting for the Berks County Trust Company under certain letters of attorney, which he contended had been improperly secured by the sending out of certain newspaper clippings, and

As part of this contest the adverse creditors objected to Mr. Sternbergh voting upon his claim of upwards of \$14,000, not because the claim was not valid, but because they said he owed the bankrupt company moneys upon a stock-subscription, which indebtedness he denied.

The Referee permitted the attorneys in the disputed letters of attorney to vote, and expressing a doubt concerning Mr. Sternbergh's claim, concluded:

"That the claim of Mr. Sternbergh cannot at this time be offered and allowed for voting purposes unless he first pays what he owes the company."

(Printed record 73-74.)\*

Declaring, however, that:

"What I say here is without prejudice to his right to offer his claim in the future." (Printed Record 73.)

The Berks County Trust Company was elected by a majority of one, that is to say, Mr. Sternbergh's vote would have prevented the election of the Berks County Trust Company and devolved upon the Court the appointment of a Trustee,

\* All references to printed record are by top paging.

while a refusal of the votes under the disputed letters of attorney would have resulted in the election of The Pennsylvania Trust Company.

The question was as to whether the Referee erred in allowing the other party to vote upon the disputed letters of attorney and in refusing to allow Mr. Sternbergh to vote.

These matters were subsequently reviewed by the District Court, which affirmed the Referee upon both points.

Mr. Sternbergh, appellee, thereupon removed the case into the Circuit Court of Appeals, which reversed the decision of the District Court, and thereupon this appeal into this Court was taken.

### **A Statement of the Questions Involved.**

FIRST. The matter was brought before the Circuit Court of Appeals by a petition to revise the decision of the Referee and of the District Court in matter of law.

The appellant contends that the decision of the Referee, affirmed by the District Court, was a judgment rejecting a debt or claim of over \$500 and that the removal to the Circuit Court of Appeals should have been by *appeal* instead of petition for revision.

The appellee, on the other hand, contends that the decision was not a judgment rejecting a claim within the intent and meaning of Sec. 25a of the Bankrupt Law, and that the cause was properly removed into the Appellate Court.

SECOND. The appellant contends that if the petition for revision in matter of law was proper,

the Circuit Court of Appeals was bound by the facts as found by the Referee and the District Court, and that the Circuit Court of Appeals reversed such findings of fact.

The appellee contends that there were no disputed facts and that the Circuit Court of Appeals did not reverse any findings of fact of the lower courts.

THIRD. The appellant contends that it is established by the facts that Mr. Sternbergh, appellee, was at the time of the election of trustee indebted to the bankrupt estate upon an unpaid stock-subscription and therefore had no right to vote without his making payment of what he owed.

The appellee answers this contention by declaring, and the Circuit Court of Appeals has decided as a conclusion of law from documentary evidence and undisputed facts, that he, the appellee, was not so indebted.

**As to the Method by which the Matter was  
Brought before the Circuit Court  
of Appeals.**

Sec. 24b of the Bankrupt Act of 1898 provides that:

“The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.”

Sec. 25a of the said Act provides:

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered and may be heard and determined by the appellate court in term or vacation, as the case may be."

Briefly stated, under Sec. 25b the Circuit Court of Appeals has

"jurisdiction in equity, either *interlocutory* or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy"; and

By Sec. 25a

"Appeals, as in equity cases, may be taken in bankruptcy proceedings.....to the circuit court of appeals.....from a *judgment* allowing or rejecting a debt or claim of five hundred dollars or over."

The grievance of Mr. Sternbergh was that in an election of trustee, those who opposed The Pennsylvania Trust Company favored by him, were allowed to vote by virtue of letters of attorney secured by what he contended were improper means,

and that by the decision of the Referee he was himself denied the privilege of voting whereby the Berks County Trust Company was elected Trustee by a majority of one vote.

Upon Mr. Sternbergh's petition for revision of the Referee's decision, the District Court affirmed the decision both upon the allowance of the voting under the questioned letters of attorney and upon the refusal to allow Mr. Sternbergh to vote.

The testimony was not disputed and the decision was purely a matter of applying the law to established facts.

The learned Judge of the District Court in affirming the Referee's decision said that the question depended upon "*facts that are not in dispute.*" (Printed record 124.)

The matter being thus one of law arising in the election of a Trustee, counsel regarded it a case for interlocutory revision within the intent and meaning of Sec. 24b.

Moreover, counsel did not regard the election of a Trustee by the method described, and which their client contended was illegal, as constituting a

"judgment.....rejecting a debt or claim" within the intent of Sec. 25, although one of the features of the alleged irregular proceeding was the refusal of the Referee to allow Mr. Sternbergh to vote.

It seemed and yet seems to counsel that by

"A judgment allowing or rejecting a debt or claim" is intended a final judgment, that is, a



judgment allowing or refusing the claimant a participation in the distribution of the estate.

A decision expressly made "without prejudice" is not such judgment.

Counsel still think that the proceeding was proper and respectfully submit the foregoing views as justifying the same.

Should the Court be in doubt, or think that the matter should have been brought into the Circuit Court of Appeals by appeal under Sec. 25a, then we respectfully submit that,

The Circuit Court of Appeals having assumed jurisdiction and passed upon the question, should be regarded as having treated the matter as if before it by appeal.

This view is sanctioned by the decision of this Court in the case of *Bryan v. Bernheimer*, 181 U. S. 192, concerning which decision this Court said in a later case:

"In the case first cited it is pointed out that the circuit court of appeals treated the case as if before it on a petition for revision, though it had been carried there by appeal; and we considered the decree as rendered in the exercise of the supervisory power." *Holden v. Stratton*, 191 U. S. 115.

Thus an *appeal* was treated as a *petition for revision*, and we submit that there is no reason why in a matter somewhat difficult and confused, a *petition for revision* should not be treated as an *appeal*.

**The Circuit Court of Appeals Reversed  
No Findings of Fact.**

The determination of the question of Mr. Sternbergh's liability to pay more money for his stock depended upon a written agreement executed by him, Charles E. Duryea, Henry Millholland, and Henry Crowther, providing for the organization of the Duryea Power Company; and

Upon a written agreement subsequently executed by the Duryea Power Company and Mr. Sternbergh, precisely similar agreements being executed between the corporation and Mr. Duryea, between the corporation and Mr. Millholland, and between the corporation and Mr. Crowther.

The agreements are printed in full, Record 61-64.

There were no facts in dispute, the question being one purely of law.

The decision of the Referee and of the District Court that Mr. Sternbergh owed money for his stock was a conclusion of law upon clearly appearing and undisputed facts.

The learned Judge of the District Court in his opinion said of Mr. Sternbergh:

"Was he therefore a debtor of the corporation? Or, to ask an equivalent question, may the creditors of the corporation treat him as a debtor? *The answer is to be found in facts that are not in dispute.*" (Printed record 124.)

Thus the District Court treated the question as one of law and not of fact.

Whether therefore the case in the Circuit Court of Appeals be treated as one of revision in matter

of law or as an appeal, that Court properly proceeded to determine it by a consideration of the written agreements between the parties in the light of undisputed facts.

**Mr. Sternbergh, the Appellee, was not Indebted to the Corporation for his Stock.**

**THE FACTS.**

The state of facts upon which it is claimed that Mr. Sternbergh is indebted to the corporation for shares of stock is as follows:

Charles E. Duryea controlled certain patent rights and inventions pertaining to the manufacture and use of motors, propellers, and light automobiles, and the Duryea Manufacturing Company of Peoria, Ill., controlled certain similar patents.

Duryea, Sternbergh, Millholland, and Crowther settled a plan for the organization of a corporation under the laws of Pennsylvania, for the manufacture and sale of automobiles, etc., with a capital stock of \$100,000, that is, 1000 shares of the par value of \$100 each.

Sternbergh was to contribute \$25,000 in cash, and Duryea was to contribute the patent rights.

Duryea was to receive 300 full-paid shares of stock and \$10,000 in money; and

Sternbergh was to have 510 full-paid shares; and Millholland and Crowther each 95 full-paid shares.

It was, as one of the learned Justices of the Circuit Court of Appeals said upon the oral argument—"a pooling of the Duryea patent rights and Sternbergh's \$25,000 in money," on the basis of an

aggregate valuation of \$110,000, Duryea taking out \$10,000 in cash and \$30,000 of full-paid stock; Sternbergh taking out \$51,000 in full-paid stock, and Millholland and Crowther taking out together \$19,000 in full-paid stock.

Having so settled their plan, the parties resorted to one of the leading lawyers of the Bar to have it carried out in legal form.

The attorney first drew and had executed a preliminary agreement between the parties embracing the arrangement, which agreement is printed in full on top pages 61 to 63 of the printed record.

After the organization of the corporation with a capital stock of the nominal value of \$1000, the stock was increased to \$100,000 according to law and separate agreements were made between the corporation and the four individuals in furtherance of the terms as set forth in the preliminary agreement; also,

Formal resolutions were passed by the Board of Directors for the issuance of the shares of stock to the parties respectively, and

All the agreements preliminary and those between the corporation and the parties, and the resolutions of the Board of Directors, were made matter of record and transcribed in full upon the minute-book.

The attorney then drew the return required by the statute, certifying that the above \$99,000 of stock had been issued "for cash and property," which return was signed by Mr. Sternbergh as President, sworn to by Mr. Millholland as Secretary, and transmitted to and filed in the office of the Secretary of State at Harrisburg.

Isaac Hiester, Esq., the attorney called as a witness, frankly declared "I drew all the papers and I am responsible for their form." (Printed record 66.)

The only confusing circumstance in the entire proceeding is the fact that in addition to the stipulation in the agreement obliging Mr. Duryea to contribute his patents and inventions, there was a clause in the preliminary agreement and copied into the agreements between the individuals and the corporation whereby Sternbergh, Millholland, and Crowther stipulated that they should contribute to the corporation "the entire and absolute ownership of all patents pertaining to the manufacture or use of automobiles, motors, and propellers or parts of either heretofore granted to or now or hereafter controlled by either of them, and all inventions of the description aforesaid heretofore made by either of them or which either of them shall hereafter make, and all patents which may be granted therefor." (Printed record 62.)

In fact, Sternbergh, Millholland, and Crowther owned no patents.

Mr. Hiester as a witness gave this reason for the insertion of the said clause:

"They were binding Mr. Duryea to contribute these patent rights and any inventions which he might make and any patents he might use, and it was thought that Mr. Sternbergh and the other parties should be bound in the same way.

Q. Was there any patents that Mr. Sternbergh owned? Mr. Millholland had no patents?

A. There was no patent owned by them. The agreements used the same general language which was used in regard to Mr. Duryea." (Printed record 66.)

Mr. Sternbergh testified:

"Q. Did you have any patent rights? A. No, sir.

Q. Did you say so? A. Yes, sir.

Q. Can you tell why the clause was inserted that you should contribute your patent rights?

A. For the reason that Mr. Duryea had patents and was contributing patents and licenses under them, and the other three were bound as he was, simply as a matter of form binding them all alike." (Printed record 68-69.)

This stipulation, binding all the parties alike, was well adapted to the case of four parties coming together for the first time in a business venture, in which the matter of patents and even inventions existing perhaps only in the minds of the parties, or thereafter to be made, were important and it was judicious to bind all alike.

The learned Judge of the District Court thus clearly and correctly stated the matter:

"Of these persons, Duryea alone, either then or afterwards, owned patents of the kind described, it being the intention of all the parties to form a corporation to put his inventions upon the market. Pursuant to this agreement, the bankrupt corporation—the Duryea Power Company—was incorporated." (Printed record 124.)

The important thing, however, for the purpose of the case is that the parties in their plan for the

payment of the stock took into account only Mr. Duryea's actual patents and inventions and Mr. Sternbergh's cash of \$25,000; that they acted in good faith towards one another; that they acted in good faith with the corporation; that they secured the advice and services of a lawyer of high standing and acted in accordance therewith, making no concealment of anything, but spreading all the details of the transaction upon the minutes of the company.

#### THE LAW.

The corporation having thus got what it was intended it should have for the stock, no further liability attached to the parties to whom the stock was issued, unless they were guilty of actual fraud in the transaction.

Under the Pennsylvania statute of April 29, 1874, P. L. 81, Sec. 17, which is part of the charter of the corporation in question, it was lawful for it to take:

"Patent-rights, and other property . . . necessary for the purpose of its organization and business, and issue stock to the amount of the value thereof, in payment thereof, and the stock so issued shall be declared and taken to be full-paid stock, and not liable to any further calls or assessments."

The taking of the Duryea patent rights being thus allowed by the company's charter, there can be no doubt that the parties organizing the company believed that the patents were worth what they were being put in at.

Mr. Sternbergh certainly believed it and certified to his belief in a very substantial way by parting with \$25,000 of his money.

Duryea certainly believed it, because he put in his patent rights on that basis and had previously held them at \$100,000. (Printed record 105.)

As to the form of the transaction, if Duryea had first assigned the patents to the four individuals and the four individuals had then transferred them to the Duryea Power Company in full payment of the stock, the transaction would have been unexceptionable and would have been precisely in accordance with the intention of the parties, but this would have been a mere difference in form.

Whether the patents were first transferred to the individuals and by them transferred to the corporation, or whether they were transferred directly to the corporation, can make no difference in substance; the purpose of the parties remains the same without regard to the form which their attorney made it assume.

The intention of the parties was that the stock should be issued "*full-paid,*" and

The learned Judge of the District Court conceded:

"that the stock was to be issued 'full-paid,' and that it was so issued with the intention of all parties then interested that his acceptance should carry no further obligation." (Printed record 126.)

The learned Judge thus stated the intention of the parties:



“Of these persons, Duryea alone, either then or afterwards, owned patents of the kind described, it being the intention of all the parties to form a corporation to put his inventions upon the market. Pursuant to this agreement, the bankrupt corporation—the Duryea Power Company—was incorporated.” (Printed record 124.)

**Only Actual Fraud would Render  
Mr. Sternbergh Liable.**

Under the rule adopted by this Court and the Courts of Pennsylvania, and, indeed, by the Courts generally, *actual* fraud only will render stockholders liable to pay beyond what was stipulated.

In the case of *Coit v. North Carolina, etc., Company*, 119 U. S. 343, Mr. Justice Field, speaking for the Court, said:

“If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In that case there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. But where full-paid stock is

issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account."

In the case of *Iron Company et al. v. Hays et. al.*, 165 Pa. 489, creditors filed a bill against the organizing stockholders of an insolvent corporation, to enforce payment of a stock-subscription.

The members of a copartnership had organized a corporation and made over to it the partnership property at a valuation of a half million of dollars, taking for the purchase-price full-paid stock, and resorted to a device consisting of the raising of the half million of dollars upon a promissory note, signed by the copartners, and placing the money to the credit of the corporation in bank, then checking it back to the copartnership for the property bought by the corporation, it not appearing, however, that any fraud or concealment was intended. The Supreme Court of Pennsylvania *disapproved* of the conclusion of the Court below:

"that the facts in evidence, connected with the fact that within a few months it was demonstrated that the property was of very small value, threw on the defendants the burden of showing clearly that the sale from themselves to themselves was in good faith on a reasonable belief of the value of the property." (Page 498.)

Mr. Justice Williams, speaking for the Supreme Court, said:

"What has the fact that, after some months spent in development of their territory, the corporation found itself disappointed in its pro-

ductiveness and a heavy loser in consequence, to do with the good faith of their purchase, or the reasonableness of the price? These are to be judged of by the facts before them when the arrangement was made."

The learned Justice also said:

"If the parties were mistaken in relation to its value, we do not see how, in the absence of any averment of fraud in the transaction, the sale can be disregarded and the subscriptions to the capital stock treated as unpaid. The proofs show that they were paid exactly in accordance with the agreement under which they were made, and until that agreement is attacked as fraudulent, the creditors stand in no better position than the corporation itself."

"*Good faith*" is "the opposite of *fraud* and *bad faith*"; and its non-existence, as in all other cases where fraud is imputed, must be established by proof."—*McConnel v. Street et. al.*, 17 Ill. 253.

**There was no Evidence, nor was there even an Allegation, of Fraud against Mr. Sternbergh and his Associates.**

The appellant and the parties who have been urging this contest have nowhere averred, nor have they proved, nor submitted testimony tending to prove, that Mr. Sternbergh and his associates acted fraudulently.

The first objection to Mr. Sternbergh's claim was in the form of written exceptions by Roger C. Aldrich and Excelsior Brass Works, two creditors. (Printed record 10-11.)

These exceptions make no charge of fraud, but simply aver that Mr. Sternbergh's claim should not be allowed, because he is indebted to the corporation in the sum of \$26,000, balance due on stock subscription; that the corporation is insolvent and that the said entire sum of \$26,000 will be required to pay debts.

There is not even an insinuation of fraud in the exceptions to Mr. Sternbergh's claim.

There was no intention to contest it on such ground, as will appear from the declaration of the contesting attorney, who said:

"The agreement which they made at the time as to what shall be put to that capital of the company is perfectly valid. The agreement as to the incorporators is binding upon them. It can only be used to the advantage of the creditors." (Printed record 107.)

The learned Referee in his opinion sustaining the exceptions spoke "of technical fraud," while expressing doubt as to the correctness of his conclusion, but did not find that any actual fraud was intended or committed.

The learned Judge of the District Court, too, failed to find any actual fraud.

**In the Absence of Fraud there is no Basis for a Claim, as the Stock was not Subscribed for, or to be Paid in money.**

"Subscribers, as generally understood, are those who, upon the formation of a corporation, agree mutually to take and pay for shares of the capital stock, and in the absence of any special provision, they agree with each other to pay

therefor the par value of the stock.”—*McDowell v. Lindsay*, 213 Pa. 591.

“A subscriber is one who has agreed to take stock from the corporation on the original issue of such stock.”—(1 Cook on Corporations, Section 10, p. 34.)

In the case of *Thames Tunnel Co. v. Sheldon*, 13 Eng. Com. Law Rpts. 161 (6 Barn. & Cress. 339), it was held under an Act of Parliament that one “who had not signed any contract was not a subscriber within the meaning of the act, and not liable to be sued by the directors.”

In the case of the *Duryea Power Company* the original capital was ten shares of \$100 each, Mr. Sternbergh subscribing for four shares, which his cash more than paid in full.

The capital stock was then increased from \$1000 to \$100,000, but the additional stock was not subscribed for.

The original agreement was to take the stock as full-paid stock for a certain amount of money and certain property, all of which the corporation got.

There was no agreement, written or oral, by which Mr. Sternbergh agreed to pay anything for the stock beyond what was actually paid for it, and therefore as the Circuit Court of Appeals decided:

“This is not the case of an uncollected or unpaid assessment or of a subscription. It is an indirect attempt to invalidate an executed transaction, which has stood unchallenged and

ratified by six years' acquiescence and enjoyment of the consideration paid therefor." (Printed record 133.)

As therefore the rule of law is that where under an arrangement between the organizers of a corporation and the corporation itself shares of stock are issued as full-paid, only actual fraud or bad faith will render the receivers of such stock liable; and

As in this case there is no evidence of fraud or bad faith, but all the circumstances combine to show the most absolute good faith,

It must result that there is no liability on the part of Mr. Sternbergh.

#### **How the District Court and Referee Erred.**

The return was that the stock was issued "for cash and property." (Printed record 19.)

We submit that it is one of the plainest of things that the \$25,000 of Mr. Sternbergh was cash, and that the patent rights of Mr. Duryea were property, and that, therefore, the return that the stock had been issued for cash and property was literally true.

The learned Referee declares:

"The Duryea Power Company by its officers reported to the State Department that its capital stock of One hundred thousand Dollars was fully paid in cash or property, whereas, in fact, as far as Sternbergh is concerned, it was not paid to the extent of Twenty-six Thousand Dollars on his shares." (Printed record 73.)

The learned Judge of the District Court, affirming the decision of the learned Referee, conceded:

“that the stock was to be issued ‘full-paid,’ and that it was so issued with the intention of all parties then interested that his acceptance should carry no further obligation.” (Printed record 126.)

But concluded that:

“So far as creditors are concerned, therefore, the certificate of increase, although it speaks of ‘property,’ affords no protection to the claimant; for in legal effect, the reference to property may be disregarded, and the certificate then amounts to no more than an untrue declaration that the increase was wholly based upon cash.” (Printed record 127.)

We submit that there is no rational theory upon which the important word “*property*,” which made the said certificate true, can be disregarded in order to make the certificate false.

The following brief reference to the Statutes of Pennsylvania will indicate how erroneous the conclusion of the learned Judge of the District Court and of the learned Referee is:

The Act of April 18, 1874, P. L. 62, Sec. 5, provides that:

“upon the increase of the capital stock.... it shall be the duty of the President or Treasurer of such corporation, within thirty days thereafter, to make a return to the Secretary of the Commonwealth, under oath, of the amount of such increase.”

The Act of April 29, 1874, P. L. 83, Sec. 22, provides that:

“upon the increase of the capital stock....of such corporation....it shall be the duty of the President or Treasurer of such corporation, within thirty days thereafter, to make a return to the Secretary of the Commonwealth, under oath, of the amount of such increase and terms of the same, that is to say, the terms on which additional stock is issued.”

The Act of February 9, 1901, P. L. 1, Sec. 3, provides that:

“Upon the actual increase of the capital stock ....of such corporation....it shall be the duty of the President or Treasurer of such corporation, within thirty days thereafter, to make a return to the Secretary of the Commonwealth, under oath, of the amount of such increase actually made.”

This last Act was passed after the incorporation of the Duryea Power Company, but it will aid in interpreting the preceding acts.

More briefly stated, the said acts, which are *in pari materia*, require the corporation to make return:

The Act of April 18, 1874, “of the amount of such increase.”

The Act of April 29, 1874, “of the amount of such increase and terms of the same, that is to say, the terms on which additional stock is issued”; and finally,

The Act of 1901, “of the amount of such increase actually made.”



The Acts of 1874 impose a penalty of \$5000 for not making the return, which is to be collected by the officers of the Commonwealth as a tax, and the Act of 1901 requires that simultaneously with the making of the return, the bonus tax of the actual increase of stock shall be paid to the State Treasurer, and it is plain that the purpose of the return has relation to the ascertainment and collection of the taxes imposed by the Commonwealth upon corporations and upon their actual stock and not to a giving of notice or information to the persons who shall deal with the corporation.

However, we submit that whatever the purpose of the said provisions is, the return made by the Duryea Power Company was a substantial compliance with the said provisions.

If the stock had been issued wholly for cash, or wholly for property, and returned as issued "for cash" or "for property" in accordance with the fact, it would have been sufficient, and when issued partly for cash and partly for property, as in this case, the return stating the issue "for cash and property," it was a literal compliance with the statutes.

The return was filed in the office of the Secretary of State October 29, 1900, where it remained unquestioned, and as stated by the learned Judge who delivered the opinion of the Circuit Court of Appeals:

"A large number of returns printed in petitioner's brief shows the return in this case is substantially in the form followed by the Pennsylvania Bar." (Printed record 133.)

We submit that Mr. Sternbergh having paid for his stock precisely what he agreed to pay, and the return having been prepared by a lawyer of high standing, to whom all the facts had been stated, and being in accordance with the practice of the Pennsylvania Bar, and being, moreover, literally true, there is no rational theory upon which Mr. Sternbergh can be held liable to make a further payment of \$26,000 for the full-paid stock received by him.

In conclusion we note that the Circuit Court of Appeals reversed the decision of the District Court as to the right to vote, but refused to disturb the election which had resulted from the wrongful withholding of such right to vote, saying:

“In view of the fact, however, that no allegation is made against the trustee, we see no reason why, at this late day, the selection of it should be disturbed.” (Printed record 134.)

Mr. Sternbergh has taken no appeal from this part of the decision, so that an affirmance of the decree of the Court below will terminate the controversy.

The appellant has abandoned thirteen of the original nineteen assignments of error, and

We submit that there is no merit in the remaining assignments or in the five which have been added, and the appeal should be dismissed and the decree of the Circuit Court of Appeals affirmed.

JOHN G. JOHNSON,  
CYRUS G. DERR,  
*Attorneys for Appellee.*

IN THE  
Supreme Court of the United States.

October Term, 1908.

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THE DURYEA POWER CO., Bankrupt, by its Trustee, the BERKS COUNTY TRUST CO., Appellant, v. HERBERT M. STERNBERGH.	}	No. 466.
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Comes now the Duryea Power Company, bankrupt, by its trustee, the Berks County Trust Company, and suggests diminution of the record in this cause, in this, to wit:

I.

That the findings of fact and conclusions of law of record in the Circuit Court of Appeals for the Third Circuit are omitted from the transcript.

II.

That in the suit of the above-entitled parties the Circuit Court of Appeals for the Third Circuit on May 8, 1908, filed its opinion and thereafter and pursuant thereto, on to wit, May 12, 1908, entered a decree reversing the decision of the lower court; that at the time the said Circuit Court of Appeals filed its opinion and decree, it failed to file a separate finding of fact and conclusion of law as required by General Orders in Bankruptcy XXXVI (3) as promulgated by the Supreme Court of the United States.

## III.

That thereafter on, to wit, June 9, 1908, a petition praying the allowance of an appeal in said cause to the Supreme Court of the United States and that a transcript of the record, proceedings, and papers on which said order was made, duly authenticated, be transmitted to the Supreme Court of the United States, was duly presented and granted by Mr. Justice Brewer; that on June 12, 1908, your petitioner presented a petition to the said Circuit Court of Appeals, praying that the said Court file with its decree rendered as aforesaid on May 12, 1908, its finding of fact and conclusion of law in accordance with the said General Orders in Bankruptcy XXXVI (3), in order that the same, together with the other papers in said cause, might be certified by its clerk to the Supreme Court of the United States; that thereafter the said clerk of the said Circuit Court of Appeals transmitted the record in the said cause to the clerk of this Honorable Court and the same was duly entered of record on July 15, 1908, but the said record failed to include the finding of fact and conclusion of law as required by this Honorable Court; that thereafter, to wit, on September 11, 1908, the said Circuit Court of Appeals filed its finding of fact and conclusion of law as of June 14, 1908, and a certified copy thereof was thereafter transmitted to and received by the clerk of the Supreme Court of the United States on September 12, 1908, a copy of which is hereto annexed as Exhibit A; that the clerk of this Honorable Court has declined to enter the same as a part of the record in this cause, on the ground that they were not incorporated in the original record as transmitted by the clerk of said Circuit Court of Appeals; that your petitioner further avers that it was not derelict or negligent in procuring the filing of the said finding of fact and conclusion of law, and that the same were not incorporated or included in the record as originally trans-

mitted to this Honorable Court for the reason, as it is advised, that they had not at that time been prepared or filed by the Circuit Court of Appeals.

Wherefore, the appellant, the Duryea Power Company, by its trustee, the Berks County Trust Company, moves the Court, under Rule XIV, to award a writ of certiorari to be issued and directed to the Justices of the said Circuit Court of Appeals for the Third Circuit commanding them that, searching the record and proceedings in the said cause, they forthwith certify to this Court the part of the said record so omitted as aforesaid, or, that the certified copy of the said finding of fact and conclusion of law now on file with the clerk of this Honorable Court be considered and deemed as the return of the said Circuit Court of Appeals.

THE BERKS COUNTY TRUST CO.,

By M. A. GERST,

*Secretary and Treasurer.*

E. F. COLLADAY,

GEO. W. WAGNER,

*Of Counsel for Appellant.*

STATE OF PENNSYLVANIA, }  
County of Berks, } ss:

M. A. Gerst, being first duly sworn according to law, doth depose and say that he is the Secretary and Treasurer of the Berks County Trust Company, trustee in bankruptcy of the Duryea Power Company, appellant as aforesaid; that the facts contained in the aforesaid petition are true and correct according to the best of his knowledge, information and belief.

M. A. GERST.

Subscribed and sworn to before me this 13th day of February, 1909.

SUE E. CONNER,

*Notary Public.*

[SEAL]

## IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

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THE DURYEA POWER Co., Bankrupt, by its Trustee, the BERKS COUNTY TRUST Co., Appellant, v. HERBERT M. STERNBERGH.	} No. 466.
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The appellee is hereby notified that the petitioner will on Monday, the 1st of March, 1909, upon the opening of the court on that day, or as soon thereafter as counsel can be heard, submit the foregoing petition to the Supreme Court of the United States in its court room in the City of Washington, District of Columbia, a copy of which petition suggesting diminution of the record and praying for the issuance of a writ of certiorari are herewith delivered to you.

E. F. COLLADAY,  
GEO. W. WAGNER,  
*Of Counsel for Appellant,*  
*Duryea Power Company.*

Service of the above notice and of the copy of the petition therein referred to is hereby acknowledged.

J. G. JOHNSON,  
*Attorney for Herbert N. Sternbergh.*

**EXHIBIT A.****IN THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE THIRD CIRCUIT.**

March Term, 1908.

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HERBERT M. STERNBERGH, <i>Petitioner,</i>	} No. 19.
<i>v.</i>	
DURYEA POWER Co., Bankrupt, <i>Respondent.</i>	

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Coram, Dallas, Gray and Buffington, J. J.

**Findings of Fact.**

The bankrupt, the Duryea Power Company, was incorporated April 6, 1900, by the State of Pennsylvania, with a capital stock of \$1,000. On April 20, 1900, it voted to increase its capital stock to 1,000 shares or \$100,000, "said additional stock being issued for cash and property." Return of such increase was duly made to the Secretary of the Commonwealth of Pennsylvania on October 31, 1900, pursuant to the recognized practice of the bar and the Department of State of Pennsylvania, such return has never been questioned or challenged. No other persons save Messrs. Sternbergh, Duryea, Mulholland and Crowther, the stockholders in said company as originally formed and increased were interested in said company and no question is here involved of any outside party buying stock therein. The company was chartered and the stock issued and divided in pursuance of an understanding between said four persons. Duryea and the Duryea Manufacturing Company of Peoria, Illinois, had some patents which the four parties named contemplated acquiring with a view of making auto-freight trucks at Reading, Pennsylvania. To obtain licenses so to do

under said patents it was necessary for Duryea to pay to the Illinois Company \$10,000. In carrying out the plans of the parties neither Mulholland, Crowther or Duryea contributed any part of the money required. It was furnished by Sternbergh alone. It was arranged that he contribute \$25,000 to a proposed company of \$100,000 capital. For this he was to receive 510 shares, the majority, in full paid shares of \$100 each. Duryea was to contribute the patents and was to receive \$10,000 in cash, of the money contributed by Sternbergh, to enable him to procure the patent licenses from the Illinois Company, 300 shares of the full paid stock and employment at \$3,000 per year and Mulholland and Crowther got 190 shares of this stock. All four parties were to assign to the company any invention made by them. The substance and effect of the agreement thus consummated was that the patents thus furnished to the Pennsylvania Company were capitalized at \$85,000, and Sternbergh's \$15,000, the part of the \$25,000 he paid over and above the \$10,000 he furnished to enable Duryea to get the patent licenses from the Illinois Company, constituted the working capital of the company. Its capital stock represented patent property \$85,000, cash \$15,000. The stock issued to all four was full paid and non-assessable. The Duryea Power Company used the patents for some years until it went into bankruptcy and never repudiated or questioned the arrangement under which it acquired them. The transaction between the four men and the company were carried out and acted upon by all parties in entire good faith.

### **Conclusion of Law.**

1. Patents are personal property and under the Pennsylvania Act of 29th April, 1874, the Duryea Power Company could "take such patent rights as is necessary for the purpose of its business and issue stock to its value thereof, in payment thereof, and the stock so issued shall be declared and taken to be full paid stock, and not liable to any further calls for assessments."

2. The stock of said company issued to Sternbergh in this case was full paid and non-assessable.



3. The Duryea Power Company at the time of its bankruptcy had no claim against Sternbergh for further or other assessments or calls on him upon said stock.

4. Its trustee in bankruptcy took no higher rights than the Duryea Power Company had.

5. Sternbergh was not indebted to the Duryea Power Company when it was adjudged bankrupt and being its creditor was entitled to prove his claim against it.

6. The referee and Court below erred in denying Sternbergh the right to prove his claim.

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Counsel for Parties.

DURYEA POWER COMPANY, BANKRUPT, *v.*  
STERNBERGH.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE  
THIRD CIRCUIT.

No. 29. Argued November 2, 1910.—Decided November 14, 1910.

Section 25*b* of the Bankruptcy Law only gives a right of appeal to this court from a decision of the Circuit Court of Appeals affirming or reversing the order of the District Court, allowing or rejecting a claim when the decision is final, whether there is a certificate under § 25*b*, 2 or not. A decision simply allowing or disallowing a claim for voting purposes without prejudice to its subsequent presentation is not final but provisional.

No appeal lies to this court from a decision of the Circuit Court of Appeals in the exercise of supervisory jurisdiction in bankruptcy matters. Nor can a petition for revision to that court be turned into an appeal.

A petition for revision opens only questions of law while an appeal opens both fact and law.

Appeal from 161 Fed. Rep. 540; 88 C. C. A. 482, dismissed.

THE facts, which involve the construction of certain provisions of the Bankruptcy Law, and the jurisdiction of this court of appeals from the Circuit Court of Appeals, are stated in the opinion.

*Mr. Edwin C. Brandenburg*, with whom *Mr. Clarence A. Brandenburg*, *Mr. F. Walter Brandenburg*, *Mr. Andrew A. Leiser* and *Mr. Thomas K. Leidy* were on the brief, for appellant.

*Mr. Cyrus G. Derr*, with whom *Mr. John G. Johnson* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case arose on a controversy as to the right of the appellee, Sternbergh, to vote on the selection of a trustee in bankruptcy. At the first meeting of the creditors Sternbergh offered for allowance a proof of claim for \$14,438.86, which was objected to on the ground that Sternbergh was indebted to the bankrupt company for unpaid stock. Sternbergh announced that he intended to use this claim for voting purposes. After a hearing the referee refused to allow the claim for use in the election and certified the facts, as Sternbergh's vote, if allowed, would have elected a different trustee. The District Judge stated the question to be whether the referee was right in rejecting the claimant's offer to vote and that it did not involve the extent but only the fact of Sternbergh's liability, and he affirmed the action of the referee. Thereupon Sternbergh filed a petition to the Circuit Court of Appeals seeking a revision of the decree in matter of law under § 24*b* of the Bankruptcy Law. That court, remarking that the facts were not in dispute, proceeded to discuss their significance and effect and reversed the decree, but allowed the selection of trustee to stand, as no allegation was made against him. The bankrupt through the trustee appealed to this court, obtaining a certificate from a Justice of this court under § 25*b*, 2.

The first question to be answered is whether this is a case in which a party is entitled to take an appeal to this court under § 25. And clearly it is not. The right of appeal from a decision of a Circuit Court of Appeals allowing or rejecting a claim is given by § 25*b* only where the decision is final, whether there is a certificate under § 25*b*, 2 or not. The Circuit Court of Appeals may render a final decision when an appeal is taken to it under § 25*a* from a judgment allowing or rejecting a claim of five hundred dollars or over. But this case did not and could not have

come to it in that way, for there was no judgment allowing or rejecting the claim. The Referee's order was "the within claim is disallowed for the present, especially as to voting, without prejudice to the claimant's right to present the claim hereafter." That is the order that was reviewed by the District Court and that was affirmed by it. Therefore Sternbergh's counsel, rightly apprehending that they could not appeal to the Circuit Court of Appeals, brought their petition for revision under § 24b, alleging that the District Judge erred in matter of law in confirming the order of the referee refusing to allow the claim of Sternbergh to be filed for voting upon the election of trustee. This is all that was brought before the Circuit Court of Appeals and all that it had authority to decide. Its decision, although directing the District Court to allow the petitioner to prove his claim, was not a final decision upon that point, and did not come to it in such a way that it could be. It simply reversed the provisional order of the referee and made a provisional, though seemingly useless order, the other way.

No appeal to this court lies from a decision in the exercise of supervisory jurisdiction. *Holden v. Stratton*, 191 U. S. 115. But it is said that the Circuit Court of Appeals treated this case as an appeal; that it did not follow the findings of the referee and the court below, as it was bound to do on a revisory proceeding; that it filed a statement of the facts found and of its conclusion of law, as required in an appeal by General Orders 36, 3, and that a Justice of this court allowed an appeal from its decision, which, as we have said, does not lie from an order or decree under § 24b. It is argued that an appeal to the Circuit Court of Appeals may be treated as a petition for revision, *Holden v. Stratton*, 191 U. S. 115, 119, and that conversely a petition for revision may be turned into an appeal, or, at least, treated as one for the purpose of an appeal to this court, if only to establish that the Circuit

Court of Appeals exceeded its jurisdiction. There are two answers to this contention. In the first place, the converse proposition does not hold. An appeal opens both fact and law, and therefore might be regarded as intended to raise questions of law in any way that might be deemed proper. But a petition for revision opens only questions of law, and when the foundation of its jurisdiction is thus narrowed, the action of the court cannot enlarge it so as to deal with the facts. In the next place, in this case the Circuit Court of Appeals made no such attempt. It treated the facts as undisputed, and differed from the court below only in its understanding of their significance and legal import. It filed no finding of facts at or before the time of entering its decree as required by the General Orders, but did so only two months after the decree had been entered, and a month after an appeal had been taken and allowed by a Justice of this court, upon a petition of the appellant.

We have considered the suggestion that if the appeal should be dismissed a certiorari should be granted, but we are of opinion that no ground is shown for the issue of the writ.

*Appeal dismissed.*